

No. 12873

United States
Court of Appeals
for the Ninth Circuit.

see vol. 2680

THE PLOMB TOOL COMPANY, a Corporation,
Appellant,
vs.

LIONEL H. SANGER,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

MAY - 20 1905

PAUL E. CHRIEN

CLERK

No. 12873

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for the Ninth Circuit.

THE PLOMB TOOL COMPANY, a Corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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SIDNEY H. WALL,
CLYDE E. TRITT,
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Los Angeles 13, Calif.

For Appellee:

KENNY and MORRIS,
250 North Hope St.,
Los Angeles 12, Calif.

In the District Court of the United States, Southern District of California, Central Division

No. 10348-WM

LIONEL H. SANGER,

Plaintiff,

vs.

THE PLOMB COMPANY, a Corporation,

Defendant.

COMPLAINT

Now comes the plaintiff, Lionel H. Sanger, by his attorneys, Kenny and Morris, and respectfully alleges as follows:

I.

This is an action brought by plaintiff under Section 7 of the Service Extension Act of 1941 (55 Stat. 628, 50 U.S.C. App. Sec. 357) and Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U.S.C. App. Sec. 308), as amended, and the jurisdiction of this Court is based on the provisions contained in subdivision (e) of said Section 308.

II.

The defendant is a corporation, duly organized and existing under the laws of the State of California, which said corporation maintains a place of business at 2209 Santa Fe Avenue, City of Los Angeles, State of California, and within [2*] the jurisdiction of this Court.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

III.

In November, 1942, the plaintiff entered upon active naval service in the naval forces of the United States and served continuously thereafter in such naval service on active duty to December, 1945, at which time plaintiff was relieved from such training and service and was ordered released from active duty and was given a Certificate of Satisfactory Service, certifying that plaintiff satisfactorily completed his period of training and service in the armed forces of the United States.

IV.

At the time plaintiff entered upon active naval service in the naval forces of the United States, and for many years prior thereto, plaintiff had a position in the employ of defendant as a salesman, and said position was not a temporary one; the plaintiff left this position in November, 1942, in order to perform the military training and service in the armed forces of the United States as hereinabove set forth.

V.

This position plaintiff had in the employ of the defendant as a salesman allowed plaintiff to sell merchandise of the defendant, on a commission basis, in the following territory: the States of Iowa, Kansas and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the State of Minnesota; the following counties in the State of South Dakota: Brown, Beadle, Sanborn and Bonhemme; and Rock Island, Illinois, and the

plaintiff was also allowed to handle and sell at the same time merchandise of other manufacturers.

VI.

When the plaintiff received his Certificate of Satisfactory Service in December, 1945, he was qualified to perform [3] the duties of such position and still is qualified to perform such duties and at all times herein mentioned has been qualified to perform such duties.

VII.

Within ninety (90) days after plaintiff was relieved, in December, 1945, from such training and service in the naval forces of the United States, the plaintiff made application to the defendant for reemployment, but the defendant failed and refused, and still fails and refuses, to restore plaintiff to his former position or to a position of like seniority, status and pay.

VIII.

Plaintiff is entitled to be restored to his former position, or to a position of like seniority, status and pay, and to compensation for all loss of wages, commissions and benefits suffered by plaintiff by reason of the defendant's unlawful action amounting to Two Hundred Thousand Dollars (\$200,000.00).

Wherefore, plaintiff respectfully prays:

1. That this Honorable Court adjudge and decree that plaintiff was entitled to be restored to his

former position with defendant upon the date of his application therefor, and that he is now entitled to be so restored;

2. That defendant be ordered, directed and required to restore plaintiff to his said position;

3. That the defendant be ordered, directed and required to compensate plaintiff for all loss of wages, commissions and benefits suffered by plaintiff by reason of the defendant's unlawful action amounting to Two Hundred Thousand Dollars (\$200,000.00), and to pay plaintiff's costs; and

4. That the plaintiff have such other and further relief as may be just and proper.

KENNY and MORRIS,

By /s/ ROBERT W. KENNY.

[Endorsed]: Filed September 22, 1949. [4]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Defendant, The Plomb Tool Company, a corporation (sued herein as The Plomb Company, a corporation), for answer to the complaint on file herein, admits, denies and alleges as follows:

1. Admits that the allegations of Paragraph II of said complaint are true with reference to this defendant, The Plomb Tool Company.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph III of said complaint to the effect that [5] plaintiff was given a Certificate of Satisfactory Service, certifying that plaintiff satisfactorily completed his period of training and service in the armed forces of the United States. Admits all the other allegations contained in said Paragraph III.

3. Denies each and every allegation contained in Paragraph IV of said complaint. Alleges in this connection that at the time plaintiff entered upon active naval service in the naval forces of the United States, plaintiff was acting as a manufacturer's representative engaged in selling the products of defendant and also the products of various other manufacturers; that as such manufacturer's representative plaintiff was engaged in the sale of defendant's products on a commission basis in a specified territory hereinafter referred to in Paragraph 4 hereof under and pursuant to a certain agreement in writing between plaintiff and defendant; that under and pursuant to said agreement defendant had no right or power to control the means or manner in which plaintiff's selling activities were performed, and that defendant did not exercise any such control; that plaintiff as such manufacturer's representative maintained his own office at his own expense in Kansas City, Missouri, where he conducted business affairs not only in connection with the sale of defendant's products but also in connection with the sale of products of

other manufacturers represented by him; and that plaintiff paid his own expenses in connection with his activities as such manufacturer's representative and in connection therewith hired and paid at least one assistant who was chosen by plaintiff and acted pursuant to plaintiff's directions. Alleges further in this connection that plaintiff's relationship with the defendant, as hereinabove described, was not a [6] position in the employ of defendant within the meaning of Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U.S.C.A. App. Sec. 308), as amended, but that plaintiff's said relationship to defendant constituted that of an independent contractor. Alleges that plaintiff terminated his said relationship with defendant in November, 1942, in order to perform the military training and service in the armed forces of the United States as set forth in said complaint.

4. Denies each and every allegation contained in Paragraph V of said complaint except as hereinafter specifically admitted or alleged. Admits and alleges that in his capacity as a manufacturer's representative hereinabove described in Paragraph 3 hereof, plaintiff was allowed to sell merchandise of defendant on a commission basis in the territory described in said Paragraph V; and that plaintiff also handled and sold at the same time merchandise of other manufacturers.

5. Denies each and every allegation contained in Paragraph VII of said complaint except as hereinafter specifically admitted and alleged. Admits and

alleges that within ninety days after defendant was relieved in December, 1945, from such training and service in the naval forces of the United States, plaintiff made application to defendant for renewal of his status as a manufacturer's representative selling defendant's products as hereinabove described in Paragraph 3 hereof, but defendant failed and refused and still fails and refuses to renew such arrangements with plaintiff. Alleges in this connection that the business of defendant had so increased by the time of plaintiff's said application that it had become [7] and was necessary for defendant to have its products sold through full-time salesmen employed by defendant and handling the sales of no other products than those of defendant and its subsidiary corporations, P & C Hand Forged Tool Company and Penens Corporation; that plaintiff had not at any time handled or sold, either as a manufacturer's representative or otherwise, any products of said subsidiary corporations, or either of them; that at or about such time defendant offered plaintiff a position as an employee of defendant selling exclusively the products of defendant and its subsidiary corporations in the "Chicago territory," which then consisted of the State of Illinois and portions of the States of Indiana, Michigan and Wisconsin, but plaintiff declined to accept such position and refused to relinquish his representation of other manufacturers in the sale of their products.

6. Denies each and every allegation contained

in Paragraph VIII of said complaint and denies specifically that plaintiff has suffered loss of wages, commissions or benefits by reason of defendant's alleged action or otherwise, in the amount of \$200,000, or in any other sum, or at all. Defendant is informed and believes and hence alleges that plaintiff has, since his release from active duty with the armed forces of the United States, acted as a manufacturer's representative in connection with the sale of the products of various other manufacturers and has received for such work wages, commissions and benefits in a substantial sum, the amount of which is unknown to defendant. [8]

As and for Its Affirmative Defenses Herein, Defendant Alleges:

First Defense:

7. The right of action set forth in the complaint did not accrue, if it accrued at all, within three years next before the commencement of this action and said claim is barred by the statute of limitations, to wit, Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California.

Second Defense:

8. The claim attempted to be set forth in the complaint herein is barred by laches and delay on the part of plaintiff to the prejudice of this defendant.

Third Defense:

9. Defendant's circumstances have so changed and had so changed at the time of plaintiff's application for renewal of his status as manufacturer's representative for defendant as to make it unreasonable to restore plaintiff to his former status.

Wherefore defendant prays that plaintiff take nothing and that defendant recover its costs herein incurred.

O'MELVENY & MYERS,

W. B. CARMAN,

SIDNEY H. WALL, and

CLYDE E. TRITT,

By /s/ SIDNEY H. WALL,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 19, 1949. [9]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court, sitting without a jury, on December 19, 1950, and the Court, having considered all the evidence, oral and documentary, and having heard the arguments of counsel for the respective parties, finds

the facts and states the conclusions of law as follows:

Findings of Fact

The Court finds all of the following facts to be true:

I.

This is an action brought by plaintiff under Section 7 of the Service Extension Act of 1941 (55 Stat. 7, 50 U.S.C. App. Sec. 357) and Section 8 of the Selective Training and Service Act of 1940 (54 Stat. 890, 50 U.S.C. App. Sec. 308), as amended, and the jurisdiction of this Court is based on the provisions contained in subdivision (e) of said Section 308. [11]

II.

The defendant is a corporation, duly organized and existing under the laws of the State of California, which said corporation maintains a place of business at 2209 Santa Fe Avenue, City of Los Angeles, State of California, and within the jurisdiction of this Court.

III.

In November, 1942, and for approximately nine years prior thereto, plaintiff was authorized to sell merchandise of defendant on a commission basis as a manufacturer's representative in the following territory: The States of Kansas, Iowa, Minnesota and Missouri; Nebraska (east of the extension of the Colorado eastern boundary); the following counties in the State of South Dakota: Brown,

Beadle, Sanborn and Bonhomme; and the City of Rock Island, Illinois.

IV.

In November, 1942, plaintiff terminated his said relationship with defendant in order to perform military training and service in the armed forces of the United States, and plaintiff thereupon entered upon active naval service in the naval forces of the United States and served continuously thereafter in such naval service on active duty until November 15, 1945, at which time plaintiff was relieved from such training and service and was ordered released from active duty.

V.

On November 15, 1945, plaintiff was placed on inactive duty by the United States Navy with a certificate of satisfactory service, and his terminal leave expired December 29, 1945.

VI.

On or about January 1, 1946, and within ninety days after plaintiff was released from training and service in the naval forces of the United States, plaintiff made application to [12] defendant for renewal of his prewar status selling defendant's products as hereinabove described, but upon such application for reinstatement defendant refused to renew plaintiff's said prewar status.

VII.

Thereafter and during the month of March, 1946,

plaintiff took up with the Selective Service System the matter of his claim for reinstatement with defendant.

VIII.

The Office of the Director of Selective Service for the State of California thereafter conferred and corresponded with defendant during or about the months of August, September and October, 1946, regarding plaintiff's claim for reinstatement, and the defendant refused to renew plaintiff's pre-war status.

IX.

The United States Attorney in Chicago, Illinois, did not file suit against defendant on behalf of plaintiff to enforce plaintiff's claim for reinstatement, and turned the file concerning such claim over to plaintiff in February, 1948.

X.

During or about February, 1948, plaintiff consulted the law firm of Arvey, Hodes and Mantynband, of One La Salle Street, Chicago, Illinois, regarding the plaintiff's claim for reinstatement.

XI.

On or about November 4, 1948, the law firm of O'Melveny and Myers, of 433 South Spring Street, Los Angeles, California, as attorney for defendant, in a letter sent to said firm of Arvey, Hodes and Mantynband, rejected, on behalf of defendant, plaintiff's said claim for reinstatement, and the contents of such letter were made known to the plaintiff on or before December 1, 1948. [13]

XII.

An action was filed by plaintiff against defendant in the United States District Court for the Northern District of Illinois on or about July 22, 1949, to enforce plaintiff's asserted right to reinstatement, which action was dismissed without prejudice on or about September 20, 1949, for want of jurisdiction over defendant in the Northern District of Illinois.

XIII.

This action was brought by plaintiff against defendant in this Court on September 22, 1949.

XIV.

Plaintiff was not guilty of laches by reason of his failure to commence this action sooner than he did. The delay in filing this suit was contributed to by the defendant and the defendant suffered no prejudice by reason of any delay.

XV.

The plaintiff as the result of a defendant's wrongful refusal to reinstate him has suffered a loss of earnings during the calendar year 1946, computed as follows:

1946 gross sales in Kansas City Territory as constituted in 1946 (Pendleton testimony, p. 162, lines 2-10).....\$737,000.00

Average commission rate on gross sales, 12.11%*.

Gross commission at 12.11%..... 89,250.70

Less:

(1) Compensation actually paid by defendant in 1946 to the two men, other than Freund, who were working the above territory (Ex. 49)\$18,443.45

(2) Additional entertainment expense to plaintiff (1/2 of plaintiff's entertainment expense per Ex. L).....\$921.00 19,364.45

Net loss of earnings from Kansas City Territory.....\$69,886.25

1946 gross sales in Minnesota and South Dakota counties of Brown, Beadle, Sanborn and Bonhemme\$208,000.00

Average commission rate on gross sales

(see above) 12.11%*.

Gross commission at 12.11%..... 25,188.80

Less: Compensation actually paid by defendant in 1946 to the two men who were working the above area, at 7 1/2 % rate..... 15,600.00

Net loss of earnings from Minnesota and

South Dakota counties..... 9,588.80

Total Net Loss of Earnings.....\$79,475.05

* Computation of average commission rate on gross sales (1) Plaintiff's 1942 commission rate of 8% on "buy-outs" would have been applicable to 8.53% of 1946 gross sales—.08 x .0853 = .0068. (2) Plaintiff's 1942 commission rate of 12 1/2 % would have been applicable to 91.47% of 1946 gross sales .125 x .9147 = .1143.

Average commission on gross sales = .1211 or 12.11%.

XVI.

During the period from January 1, 1946, to November 30, 1950, plaintiff rendered services to various firms and corporations in the sale of their products and received from said respective firms and corporations as compensation for personal services the amounts set forth in defendant's Exhibit Q, entitled "Sanger Earnings." Plaintiff's gross income, expenses and net profit from personal services during the period from January 1, 1946, to November 30, 1950, were as set forth in said Exhibit Q.

XVII.

All of the factual matters alleged in plaintiff's complaint and in the Pre-Trial Stipulation, and not otherwise specifically found to be true by the foregoing findings, are hereby found to be true. [15]

Conclusions of Law

Upon the Findings of Fact hereinabove set forth, the Court makes the following Conclusions of Law:

I.

Plaintiff left a position in the employ of the defendant within the meaning of the Selective Service Act of 1940, as amended (50 U.S.C. App. Sec. 308b) and that plaintiff's prewar status with the defendant was not that of an independent contractor.

II.

The circumstances of the defendant have not so changed as to make it impossible or unreasonable to restore plaintiff to his prewar status.

III.

On or about January 1, 1946, and at all times thereafter defendant has wrongfully refused to restore plaintiff or offer to restore plaintiff to a position of like seniority, status and pay equivalent to that left by plaintiff to enter the naval service.

IV.

The plaintiff's right of action is not barred by the statute of limitations, to wit, Section 338, Subdivision 1, of the Code of Civil Procedure of the State of California, or at all.

V.

The plaintiff is entitled to recover from defendant as damages the sum of \$79,475.05, together with interest thereon computed at the rate of 7% per annum from January 1, 1947, and less tax withholding and other deductions required by law.

VI.

The plaintiff is entitled to an order directing the defendant within ten days after written notice of entry of judgment herein to reinstate plaintiff to a position as head of [16] sales for the Kansas City territory as it was constituted on January 1, 1951, under such financial arrangements as existed on said date for the then acting head of sales for said territory and under an arrangement whereby plaintiff will devote his entire time to the sale of the products and merchandise of defendant and its subsidiary corporations, P & C Hand Forged Tool Company and Penens Corporation.

VII.

Plaintiff is entitled to an order directing and enjoining defendant not to discharge him without cause from said position as head of sales for the Kansas City territory for a period of one year from the date of his restoration to said position.

VIII.

The Court should retain jurisdiction over the plaintiff and defendant to enforce compliance by the plaintiff and defendant with the terms and provisions of this judgment so that the plaintiff need not resort to any other proceeding in connection with the enforcement of the provisions of the judgment herein.

Dated: This 31st day of January, 1951.

/s/ WM. C. MATHES,
U. S. District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 31, 1951. [17]

In the United States District Court for the Southern District of California, Central Division
No. 10348-WM

LIONEL H. SANGER,

Plaintiff,

vs.

THE PLOMB TOOL COMPANY, a Corporation,
Defendant.

JUDGMENT FOR PLAINTIFF

This cause came on regularly for trial on December 19, 1950, Honorable William C. Mathes, Judge of the above-entitled Court, presiding, plaintiff appearing by his attorneys, Kenny and Morris, Robert W. Kenny and Robert S. Morris, Jr., and the defendant, Plomb Tool Company, Inc., appearing by its attorneys, O'Melveny and Myers, Sidney H. Wall and Clyde E. Tritt, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law, having directed that judgment be entered in accordance therewith;

Now, Therefore, by reason of the law and findings aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

1. That the defendant, within 10 days after written notice [19] of entry of judgment herein, employ the plaintiff as its sales manager in the Kansas City territory as it was constituted on January 1, 1951,

and that plaintiff be compensated under the same financial arrangements as existed on said date for the then acting sales manager of said territory, and that the plaintiff devote his entire time to the sale of the products and merchandise of the defendant and its subsidiary corporations, P & C Hand Forged Tool Company and Penens Corporation.

2. That the defendant is hereby enjoined not to discharge the plaintiff from said position without cause for a period of one year from the date of said reinstatement.

3. This Court will retain jurisdiction over the parties for the purpose of enforcing the terms hereof and so that plaintiff need not resort to any other action to enforce the terms of this judgment or any part thereof, or to obtain judgment for such additional sums in the future as may become due.

4. That plaintiff have and recover judgment against the defendant in the aggregate sum of \$102,185.25, less the amount of tax withholding and other deductions required by law to be made by defendant at the time of payment thereof, and for plaintiff's costs of suit herein. Costs taxed at \$17.48.

January 31, 1951.

/s/ WM. C. MATHES,

United States District Judge.

Affidavit of Service by Mail attached.

Judgment entered Feb. 1, 1951.

[Endorsed]: Filed January 31, 1951. [20]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Plomb Tool Company, a corporation, defendant above named (named in the complaint herein as "The Plomb Company, a corporation, Defendant"), hereby appeals to The United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 1, 1951.

O'MELVENY & MYERS,

SIDNEY H. WALL,

CLYDE E. TRITT,

By /s/ SIDNEY H. WALL,

Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 5, 1951. [22]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL

Pursuant to Rule 75(d) of the Federal Rules of Civil Procedure, defendant and appellant above named hereby states that the points on which it intends to rely on the appeal from the Judgment entered herein are as follows:

1. Plaintiff's claims for reinstatement and damages are barred by the Statute of Limitations, to wit, Section 338, Subdivision 1 of the Code of Civil Procedure of the State of California; and the Court erred as a matter of law in concluding to the contrary.

2. Plaintiff's claims for reinstatement and damages are [24] barred by laches and delay on his part; and the Court's finding that plaintiff was not guilty of laches is not supported by any substantial evidence and is contrary to the evidence.

3. Plaintiff's pre-war status was that of an independent contractor and hence he is not entitled to reinstatement or damages under the Selective Service and Training Act of 1940, as amended; and the Court erred as a matter of law in concluding that plaintiff left a position in the employ of defendant within the meaning of said Act and that his pre-war status was not that of an independent contractor.

4. Plaintiff is not entitled to the relief granted, even assuming, without conceding, that he left a position in the employ of defendant within the meaning of the Selective Service and Training Act, and that his claim is not wholly barred by the Statute of Limitations or by laches, in that:

(a) Defendant's circumstances had so changed by the time of plaintiff's application for reinstatement as to make it unreasonable, within the meaning of said Act, to require defendant to restore plaintiff to his pre-war status; and the Court erred as a matter of law in concluding to the contrary.

(b) The defendant fully satisfied any obligation it may have had to plaintiff by offering him "a position of like seniority, status and pay" within the meaning of said Act, and his rejection of such offer bars his claims to reinstatement and damages; and the Court erred as a matter of law in concluding to the contrary. [25]

5. Assuming, without conceding, that plaintiff is entitled to any relief, the relief awarded plaintiff is excessive as a matter of law, in that:

(a) By reason of his delay in filing this action, plaintiff is not entitled to recover any damages for loss of earnings for any period prior to the commencement of this action on September 22, 1949; and the Court erred in awarding him damages measured by his loss of earnings during the calendar year 1946.

(b) The Selective Service and Training Act guarantees a veteran only one year's re-employment and it was therefore an error to award plaintiff damages measured by his loss of earnings during the entire calendar year 1946, in addition to ordering defendant to reinstate plaintiff and enjoining defendant not to discharge him without cause for the period of one year

(c) If plaintiff was entitled to any damages measured by loss of earnings for the year 1946.

(i) Such loss of earnings should have been computed on the basis of the commission rate of $7\frac{1}{2}\%$ actually in effect for all defendant's sales representatives during that year; and the

Court erred as a matter of law in computing such loss of earnings on the basis of plaintiff's pre-war commission rates of $12\frac{1}{2}\%$ and $8\frac{1}{2}\%$;

and

(ii) Such loss of earnings should [26] have been computed on the basis of defendant's Kansas City Territory as the same was constituted in 1946; and the Court erred as a matter of law in computing such loss of earnings on the basis of plaintiff's larger pre-war territory.

(d) Any damages awarded plaintiff for loss of earnings are subject to offset for amounts earned by plaintiff in other employment during the same period; and the Court erred as a matter of law in refusing to allow such offset for plaintiff's earnings from personal services rendered to others during the year 1946.

Dated: February 9, 1951.

O'MELVENY & MYERS,

SIDNEY H. WALL,

CLYDE E. TRITT,

By /s/ SIDNEY H. WALL,

Attorneys for Defendant
and Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed February 9, 1951. [27]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Defendant and appellant above named hereby designates the following portions of the record, proceedings and evidence in the above-entitled action to be contained in the Record on Appeal herein:

1. The Complaint, filed on September 22, 1949.
2. The Answer filed by defendant herein.
3. The Pretrial Stipulation filed September 20, 1950.
4. The Reporter's Transcript of the evidence on file herein.
5. All plaintiff's Exhibits (1 to 51, [29] inclusive) received in evidence or marked for identification, including Exhibits 33 to 47, inclusive, which were received in evidence by reference, respectively, to Exhibits A to O, inclusive, attached to the Affidavit of Lionel H. Sanger filed herein on or about April 10, 1950, and also including the Supplemental Stipulation of Facts dated January 22, 1951, which was approved by the Court, received in evidence as plaintiff's Exhibit 51 and filed herein on January 31, 1951.
6. All defendant's Exhibits (A to U, inclusive) received in evidence or marked for identification.
7. The Reporter's Transcript of the Oral Opin-

ion of the Court rendered on January 9, 1951, which transcript is on file herein.

8. The Findings of Fact and Conclusions of Law.

9. The Judgment for Plaintiff entered herein on February 1, 1951.

10. The Notice of Appeal, showing date of filing.

11. This Designation, as well as any other designations or stipulations of the parties which may be filed subsequently hereto as to the material to be included in the Record on Appeal.

12. The Statement of Points on which appellant intends to rely on appeal.

With reference to designations 4, 5, 6, and 7 above, you are advised that defendant and appellant intends to apply to the above-entitled Court for an order under Rule 75(i) with respect to the transmission of the original papers and exhibits to the Court of Appeals, and will advise if and when such order has been obtained.

Dated: February 9, 1951.

O'MELVENY & MYERS,
SIDNEY H. WALL,
CLYDE E. TRITT,

By /s/ SIDNEY H. WALL,
Attorneys for Defendant
and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 9, 1951. [30].

In the United States District Court, Southern
District of California, Central Division

Honorable William C. Mathes, Judge Presiding

No. 10348-WM-Civil

LIONEL H. SANGER,

Plaintiff,

vs.

THE PLOMB TOOL COMPANY, a Corporation,
Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, December 19, 1950

Appearances:

For the Plaintiff:

KENNY & MORRIS, By

ROBERT W. KENNY, ESQ., and

ROBERT S. MORRIS, ESQ.

For the Defendant:

O'MELVENY & MYERS, By

SIDNEY H. WALL, ESQ., and

CLYDE E. TRIPP, ESQ.

Tuesday, December 19, 1950, 10:00 A.M.

Mr. Kenny: If the court please, Mr. Wall and I have both expressed a desire to make an opening statement to you and if the court has no objection, we will proceed in that manner.

The Court: Very well, you may.

(Opening statements of counsel omitted from transcript.)

Mr. Kenny: We will call Mr. Sanger.

LIONEL H. SANGER

the plaintiff herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Lionel Sanger.

The Clerk: Have you any initial?

The Witness: Henry, H.

Direct Examination

By Mr. Kenny:

Q. Where do you live, Mr. Sanger?

A. Chicago, Illinois.

Q. How old are you now? A. 42.

Q. Directing your attention to the year 1932 or to 1933, did you attend the National Automobile Parts Show? In which one of those years was it you attended the National [3*] Automobile Parts Show? A. It was in 1931 or '32.

Q. Before that time had you been in the automobile parts business in any way?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Lionel H. Sanger.)

A. Yes. I worked for an automobile parts jobber in Chicago that carried Plomb tools.

Q. At the 1932 convention what did you do in respect to Plomb tools?

A. I contacted the Plomb tool representative at that time, who was James Durham, and he told me that he controlled all the midwest territory. At that time the United States was divided into, I think, oh, just approximately three sections, east, west, and midwest, and Mr. Durham had—oh, as I remember, all the states west of Ohio up to Denver, up to Canada, and I believe, south almost as far as Texas. I think Mr. Serp had Texas at that time. And he told me that he wanted to dispose of part of it, although there were no customers there in the midwest area that he spoke of, which was Kansas, Iowa, Nebraska, and Missouri. If I wanted to work that section, he would take me to the salesmanager of The Plomb Tool Company and introduce me. So we went to see Mr. E. D. Moore who was salesmanager.

Q. Salesmanager of Plomb Tool?

A. Yes, sir.

Q. And what did you and Mr. Moore say on that occasion? [4]

A. Mr. Moore—

Mr. Wall: If your Honor please, I wish to object to this line of questioning on the ground that it is irrelevant and immaterial and too remote. This, as I understand it, relates to the year 1932 and the inception of the plaintiff's relationship with the defendant. It seems to me the issue here is the

(Testimony of Lionel H. Sanger.)

character of that relationship at the time when the plaintiff went into the armed services, and this can have no bearing on any of the real issues in the case.

Mr. Kenny: I am not going to take long on it, and I do think that the court will not have a full grasp of the relationship unless we take it from its inception.

The Court: Very well. I will overrule the objection and admit it in evidence.

A. Mr. Moore told me he would hire me and that he would see if he could obtain some financial assistance in the way of other lines, because The Plomb Tool Company was not in a position to add any expense of salesmen. And he took me to Mr. Ahmen-dinger in Chicago, who represented lines in the same territory as Mr. Durham, and he made the arrangement where I would get this Wohler line plus a few other small lines to carry me. And that is the reason that I worked for Plomb, where I received no money until about the 15th month, as I remember, I got 82 cents and then the following year about \$300 and went up from there. [4-A]

Q. Will you tell the court what the line of the Wohler Company consists of?

A. Wohler Corporation manufactures parts such as king bolts, fly-wheel gears, pumps, gear heads, and other items in tools.

Mr. Kenny: I am going to offer for identification at this time a table of income and disbursements.

(Testimony of Lionel H. Sanger.)

Mr. Wall: Are you simply offering it for identification?

Mr. Kenny: For identification.

The Clerk: 1 for identification.

The Court: Have the exhibits been numbered which are described in the pre-trial stipulation?

Mr. Kenny: They have not. I propose to introduce the exhibits chronologically. The difficulty with the pre-trial stipulation is that it does not present an orderly sequence. I will present them in exact sequence, and at the time I do I will refer to the pre-trial number so that that will be clear. There are some of them that your Honor may not have seen at all, as a result of recent stipulations.

The Court: Very well.

Q. (By Mr. Kenny): Mr. Sanger, drawing your attention to Exhibit 1 for identification, you received according to that no income from Plomb during the year 1931? A. That is correct.

Mr. Wall: Just a moment. May we have some foundation [5] laid for the series of figures shown on Exhibit 1 for identification, Mr. Kenny?

Mr. Kenny: Mr. Sanger, this exhibit was made up by you and me jointly and separately, was it not, from your income tax returns? A. Yes, sir.

Q. And your books, is that correct?

A. Yes, sir. That shows all the monies received by me since 1933, and in 1931 and '2 I just don't have those, which was the amount that Mr. Almen-dinger paid me when I worked at that time for him.

(Testimony of Lionel H. Sanger.)

Q. In 1933, this table, Exhibit 1, shows that you received from Plomb \$341.42, is that correct?

A. Yes, sir.

Q. And from Wohler \$2,510.69?

A. Yes, sir.

Q. And from Liberty Accessories Corporation \$53.87?

A. Yes, sir.

Q. Did Liberty Accessories sell tools?

A. No, sir; piston expanders.

Q. Piston expanders?

A. Yes, sir.

Q. And from New England Auto Products \$369.93.

A. Yes, sir.

Q. Do they sell tools? [6]

A. Universal joints.

Mr. Wall: If your Honor please, may it be understood that my objection goes to this entire line of inquiry as to the period prior to 1941?

The Court: Yes, it may, and objection overruled.

Mr. Wall: Thank you, your Honor.

Mr. Kenny: Without going over, item by item, I will offer this Plaintiff's Exhibit No. 1 for identification into evidence at this time.

Mr. Wall: That is objected to, your Honor, on the ground that it is incompetent, irrelevant and immaterial insofar as it relates to income or expenses of the plaintiff in any years other than the years 1941 and 1942 which were under the contract in effect at the time of his entry into the Navy, and to the years 1946 and subsequent years since the war period.

I note, if your Honor please, that this includes

(Testimony of Lionel H. Sanger.)

not only figures relating to the period from 1932 to 1940, inclusive, but also relates to figures during the war years of 1943, 1944, and 1945. And I object on the ground of immateriality.

Mr. Kenny: I have discussed the reason for the offer of the other years. The reason for the offer of the years 1943, 1944, and 1945 will become material, because we intend to show that during that time Mr. Sanger was paid by these [7] other lines; that is, while he was at war he was paid commissions by Powell Muffler and Precision Parts and others, and that will become material as bearing on the nature of their closing negotiations when they did break off relationship early in 1946.

The Court: I will sustain the objection at this time to the offer of the exhibit. You may renew it at a later stage of the plaintiff's case.

Mr. Kenny: The reason I offered it at this time is not—I agree with your Honor that we have not connected it up—but merely so the court will have the table, so I won't be developing the table item by item and encumbering the record. And if counsel will let the court examine the exhibit for identification, it will save that much time and we will connect it up later on.

Mr. Wall: May I suggest this, Mr. Kenny: That we have prepared from Mr. Sanger's income tax returns, which you have kindly made available to us, a similar tabulation for the years 1941, 1942, 1946, '47, '48, and '49, which I have no objection to that portion of it, and I would be happy to hand

(Testimony of Lionel H. Sanger.)

you the schedule we have made up on that basis if you would care to use it.

Mr. Kenny: I would like to hand this to the court and we will work from our schedule. Our schedules agree, but this has certain graphic qualities that I would like to have [8] before the court.

Mr. Wall: I certainly have no objection to your Honor looking at the exhibit.

The Court: Very well. I will sustain the objection at this time to the receipt of the document in evidence.

Mr. Kenny: I am now referring to Exhibits 51, 52, and 53 in the Second Supplemental Pre-Trial Stipulation.

Mr. Wall: May I suggest, Mr. Kenny, that we call them "items" of that stipulation?

Mr. Kenny: All right, very good.

Q. Items 51, 52, and 53, and I will ask if you received from Plomb Tool Company this sales report dated January 31, 1938? A. Yes, sir.

Mr. Kenny: We ask that that be introduced as Plaintiff's 2.

Mr. Wall: That is objected to, your Honor, on the grounds that it is incompetent, irrelevant and immaterial, and that no proper foundation has been laid to show the materiality of the document at this time. It purports to be a compilation "Sales Report," dated "January 31, 1938," which is prior to the term of the contract in effect at the time the plaintiff went into the service. It simply designates salesmen's comparative standings, and I think has

(Testimony of Lionel H. Sanger.)

no bearing whatsoever—aside from the time element—has no bearing [9] whatsoever on the question as to whether this man was an independent contractor or an employee.

The word “salesman,” according to Webster, does not mean anything except a man who sells goods, and has no bearing upon his relationship as an employee or an independent contractor.

The Court: Is there any question as to the authenticity of that document?

Mr. Wall: I have stipulated to the authenticity of the document, your Honor.

The Court: Very well, objection will be overruled and it will be received as Plaintiff’s Exhibit 2.

Q. (By Mr. Kenny): In 1938 did you receive a document from Plomb Tool Company headed “Salesmen’s Standing by Dollar Volume”?

A. Yes, sir.

Mr. Kenny: We ask that that be received into evidence as Exhibit 2 (3).

The Court: That is item 52 of the Second Supplemental Pre-Trial Stipulation?

Mr. Kenny: That is correct.

Mr. Wall: I make the same objection, your Honor.

Mr. Kenny: It will be Exhibit 3. I am sorry.

The Court: The objection is overruled. It may be received. [10]

Q. (By Mr. Kenny): On September 29, 1938, did you receive from Plomb Tool Company a general sales letter re condition of your accounts re-

(Testimony of Lionel H. Sanger.)

ceivable, to which is attached a table of Condition of Accounts Receivable? A. Yes, sir.

Mr. Kenny: That is item 53. We ask that that be received into evidence as Exhibit 4.

Mr. Wall: I object on the same grounds, your Honor.

The Court: Overruled.

Mr. Kenny: Item 54, gentlemen.

Q. On October 27, 1938, did you receive from Plomb Tool Company a memorandum two pages in length respecting Third Quarter Sales Report?

A. Yes, sir.

Mr. Kenny: I ask that that be received into evidence as Plaintiff's Exhibit 5.

Mr. Wall: I object to that, your Honor, on the grounds that it is incompetent, irrelevant and immaterial because of the date being in 1938 prior to the contract of employment.

The Court: Overruled.

Q. (By Mr. Kenny): On November 19, 1938—this is item 55, gentlemen—did you receive from Plomb Tool Company a one-page inter-office memo on the subject Third Quarter Sales Report?

A. Yes, sir. [11]

Mr. Kenny: I ask that that be received into evidence as No. 6.

Mr. Wall: I object to that on the same grounds, your Honor, and also because I fail to see anything in the text of the memo which can possibly have any bearing on the issues in this case.

The Court: Overruled.

(Testimony of Lionel H. Sanger.)

Q. (By Mr. Kenny): Now I will show you—this is item 8 in the Pre-Trial Stipulation.

Mr. Wall: Which item?

Mr. Kenny: Item 8.

Q. Did you receive and execute a document, undated, entitled Memorandum of Agreement, the next to the last paragraph of which states:

“This agreement shall remain in force until December 31, 1939,”

and so on? A. Yes, sir, I did.

Q. Can you tell the court when you received it, the circumstances, and when you signed it, if you did?

Mr. Wall: Which item is this? Is this 7 or 8?

Mr. Kenny: This is item 8, the so-called undated agreement.

Mr. Wall: May I see it?

The Court: Item 8 of Schedule of Exhibits attached to [12] the Pre-Trial Stipulation.

Mr. Kenny: That is correct.

The Court: It is understood, then, gentlemen, that when you refer to “items” you are referring to items numbered as in the Schedule of Exhibits attached to the original Pre-Trial Stipulation filed September 20, 1950, or the Supplemental Pre-Trial Stipulation filed September 29, 1950, or the Second Supplemental Pre-Trial Stipulation filed December 19, 1950.

Mr. Kenny: That is correct.

Mr. Wall: Yes, your Honor.

The Court: Very well.

Mr. Kenny: You may answer the question.

(Testimony of Lionel H. Sanger.)

A. I received this in the mail from The Plomb Tool Company as a sales agreement, which was the first one that I recall being issued by the company.

Mr. Wall: Could you speak slightly louder, Mr. Sanger? I have difficulty in hearing you.

A. Yes, sir. I received this as a sales agreement to apply, I believe, for a year. And when it was given to me it was to, as Mr. Moore said—a new gentleman had come in with the firm, Mr. Dillon Stevens, and before signing this I had the pleasure of meeting Mr. Stevens, and it was mentioned that due to social security regulations these contracts were being drawn up and that would save the company—I don't [13] remember the percentage—I believe it was two per cent, and would save us two per cent, save the salesmen two per cent, and it was just a continuation of the way that we worked. There was no change.

Q. (By Mr. Kenny): Can you tell us whether or not, to the best of your recollection, you had ever signed any contract with Plomb Tool Company before that?

A. I don't remember any prior to this.

Q. I call to your attention that this copy which we have is signed by Mr. Moore. A. Yes, sir.

Q. Now, do you recall that Mr. Moore left the company about September 1st, 1938?

A. Yes, sir.

Q. In relation to that date would you say approximately when this contract was presented to you? A. It was just prior to his leaving.

(Testimony of Lionel H. Sanger.)

Mr. Kenny: We ask that this document between Plomb Tool Company and L. H. Sanger, "called the Salesman" be introduced as Plaintiff's next in order, No. 7.

Mr. Wall: I object to that on the grounds there is no showing that the document was ever executed by anybody except Mr. Moore for the Plomb Tool Company.

The Court: Any question about his authority?

Mr. Wall: No. But I do not believe the agreement ever [14] became an agreement, because I do not believe Mr. Sanger signed it, or at least I have not heard him so testify. Perhaps I missed it.

The Witness: I did not sign my copy. This is my copy. The copy that I signed was forwarded to the Plomb Tool Company.

Mr. Wall: You did sign one copy of this agreement?

The Witness: Yes, sir.

Mr. Wall: I withdraw my objection, your Honor.

The Court: Very well.

Mr. Wall: But I do object on the grounds of irrelevancy and immateriality because of the date being prior to the date of the contract under which Mr. Sanger was operating at the time he went into the service.

The Court: Very well, that objection is overruled. The document will be received as Plaintiff's Exhibit 7. That is item 8 of the Schedule?

(Testimony of Lionel H. Sanger.)

Mr. Kenny: That was item 8, yes. Directing your attention, gentlemen, to item 7.

Q. I show you, Mr. Sanger, a Memorandum of Agreement bearing date January 1, 1939, between the Plomb Tool Company and L. H. Sanger, "hereinafter called the Representative" and I will ask you if that is your signature and if that is Mr. Dillon Stevens' signature on that for the Plomb Tool Company? A. Yes, sir, it is. [15]

Mr. Kenny: We ask that this item 7 be received as Exhibit 8.

Mr. Wall: I object to that, your Honor, as irrelevant and immaterial, not being the contract which was in effect at the time the plaintiff went into the service.

The Court: Overruled.

Q. (By Mr. Kenny): Now, Mr. Sanger, can you testify whether that was signed as of the date it bore, to wit, January 1st, 1939, or whether it was signed, actually signed at some later date?

A. It was signed at a later date, to my memory, about three months, and then it was just mailed back.

Mr. Kenny: Directing your attention, gentlemen, to item 56.

Q. Mr. Sanger, I show you a mimeographed one-page memorandum to All Salesmen headed "Secret and Confidential," and ask you if you received that from the Plomb Tool Company on or about the date it bears, to wit, February 7, 1939?

(Testimony of Lionel H. Sanger.)

A. Yes, sir. That was sent to me for winning the sales campaign.

Mr. Kenny: We ask that that be received as Exhibit No. 9.

The Court: That is item?

Mr. Kenny: Item 56.

Mr. Wall: That is objected to, your Honor, as incompetent, [16] irrelevant and immaterial because dated prior to the contract in effect when Mr. Sanger went into the service; also, as being irrelevant to any issue in the case insofar as I can see according to its text.

Mr. Kenny: I merely say that the text refers to Mr. Sanger's having won a fine Hamilton watch on the basis of selling more things than anybody else.

The Court: It is offered to show his status, is that it?

Mr. Kenny: That is right.

Mr. Wall: And I submit that it has no bearing on status as it uses the equivocal term "salesmen."

The Court: Overruled, and received as Plaintiff's Exhibit 9.

Mr. Kenny: Without belaboring, Judge Harrison had a similar case of Lee against Remington-Rand, and they went in there at great length to prize contests and comparative sales statistics, and that is where I got my idea and that is what I am following now.

Next, item No. 57; that is more about this watch.

(Testimony of Lionel H. Sanger.)

Q. Mr. Sanger, I ask you if you received a one-page memorandum dated March 7, 1939?

A. Yes, sir, I did.

Mr. Kenny: We ask that that be received as Exhibit No. 10.

Mr. Wall: Same objection, your Honor. [17]

The Court: Overruled.

Mr. Kenny: Just to complete the sequence, Mr. Wall, we think it might be useful to put in No. 9, which I believe you have the original of. It is a supplement agreement. No. I withdraw that. I do not think No. 9 is material to our case. That is another transaction. We will withdraw that.

We now call your attention to item 46.

The Court: By "No. 9" you are referring to item 9?

Mr. Kenny: Yes, item 9. We will withdraw that.

Q. And I will ask you, Mr. Sanger, if on or about August 23 you received from Plomb Tool Company the following telegram: "Your Company Greatly Honored by Ellfeldt and Proud of You"?

A. Yes, sir.

Mr. Kenny: We ask that be received as Exhibit No. 11.

Mr. Wall: That is objected to, your Honor, as being clearly irrelevant so far as I can see to any issue in the case, unless it is connected up to show what this "Ellfeldt" proposition is.

Q. (By Mr. Kenny): Can you tell us what is the Ellfeldt Company?

A. Well, the Ellfeldt Company is a very large

(Testimony of Lionel H. Sanger.)

industrial supply company, and Plomb up to that time had been very unsuccessful with industrial tools; in fact we had been practically automotive up until that time. That was the first large one that was closed east of the West Coast. [18]

Mr. Wall: I renew the objection, your Honor. I do not see that the fact that apparently Mr. Sanger has done a good job at the Ellfeldt Company is material here. The issue here is as to his capacity as a salesman.

Mr. Kenny: You did not catch the nuances of it, nor will the record reflect it. I read the language "Your Company." The language "your company" is the language we depend upon.

The Court: This again, is to show status, is it?

Mr. Kenny: That is correct. It is "your company."

The Court: Overruled. That is, item 46 of the Schedule will be received as Plaintiff's Exhibit 11.

Q. (By Mr. Kenny): Now, Mr. Sanger, in December of 1939 did you attend a sales meeting of Plomb Tool Company here in Los Angeles?

A. Yes, sir.

Q. Can you tell who paid your expenses to come to that meeting?

A. The Plomb Tool Company paid my expenses.

Mr. Kenny: I will go on to item 58.

Q. On February 20, 1940, did you receive a one-page memorandum from Plomb Tool Company under the subject "Understanding Instructions"?

A. Yes, sir.

(Testimony of Lionel H. Sanger.)

Mr. Kenny: We offer that as Plaintiff's No. 12.

Mr. Wall: Which item, Mr. Kenny? [19]

Mr. Kenny: That is item 58.

Mr. Wall: 58?

Mr. Kenny: Yes.

The Court: Is there objection?

Mr. Wall: Pardon me, your Honor. I did not have the document. Yes, your Honor, that is objected to as incompetent, irrelevant and immaterial, as having no bearing whatsoever upon the status of this man, and as being dated prior to the period of the contract under which he went into the service.

Mr. Kenny: We agree that most of it is immaterial, but the final, ultimate paragraph is the one we depend upon, in which Plomb Tool Company says:

"You are a very 'top string' salesman. You know that, and I know it. Before you take the next step in industry, whether it be with this company or some other one, you will have to be a good organization man—and I leave you that to think about."

The Court: Objection overruled, received as Exhibit 12.

Q. (By Mr. Kenny): On April 8, 1940, did you receive from the Plomb Tool Company a memorandum—this is item 59, Mr. Wall—a memorandum entitled "Service Button"? A. Yes, sir.

Q. And with that memorandum did you receive a program entitled "Plomb Tool Company Family Day Party April Fifth"? A. Yes, sir. [20]

(Testimony of Lionel H. Sanger.)

Q. And does your name appear on the last page of that program under the "7 years" under the title "Presentation of Service Pins to Plomb Tool Co. Employees"? Does your name appear as a seven-year employee? A. Yes, sir.

Q. And did you receive a silver service button at that time? A. I did.

Mr. Kenny: We ask that the memorandum and the program of the Family Day Party be received as Plaintiff's Exhibit 13.

The Court: Is there objection?

Mr. Wall: No objection.

The Court: Received into evidence.

Mr. Kenny: This is item 60.

Q. On April 10, 1940, did you receive a two-page memorandum from the Plomb Tool Company headed "3 Months Review," ended at page 1 with a piece of verse, and on page 2 a "List of New Plomb Jobbers" in which your name appears?

A. Yes, sir, I did.

Mr. Kenny: We ask that be received as Plaintiff's 14.

Mr. Wall: That is objected to as irrelevant and immaterial because of the date in 1940, and also because we contend, at least, that the term "salesmen" does not necessarily bear that connotation.

The Court: Overruled. Received as Plaintiff's Exhibit 14. [21]

Mr. Kenny: Yes, I believe I will put it in. This one that you suggested, it is items 1 and 2 of the stipulation.

(Testimony of Lionel H. Sanger.)

Mr. Wall: Yes.

Q. (By Mr. Kenny): I will ask you if on or about January 18, 1941, you signed a contract with the Plomb Tool Company, a photostatic copy of which I show you herewith?

A. Yes, sir, I did.

Q. And if on March 19 you signed a sort of codicil to that called "Supplemental Territorial Agreement" amending paragraph c of that contract?

A. Yes, sir, I did.

Mr. Wall: The one you just referred to is item 2 in the stipulation, counsel.

Mr. Kenny: Yes. We will ask that those two items be introduced as a single item. It so turns out I have our file copy. Do you want the original?

Mr. Wall: We have the original if you prefer to introduce it.

Mr. Kenny: We might as well.

Mr. Wall: May I suggest, Mr. Kenny, that items 3, 4, 5, and 6 be introduced along with that, because those are further modifications of the same agreement prior to December 19, 1942.

Mr. Kenny: Yes, I will reach them. I am trying to bring everything in chronologically so far for the assistance of the [22] court.

The Court: Do you wish items 1 and 2, the contract of January 18, 1941, and the supplemental agreement of February 1, 1941, to comprise a single exhibit?

Mr. Kenny: I think that would be all right.

The Court: Exhibit 15.

(Testimony of Lionel H. Sanger.)

Mr. Kenny: Yes.

The Court: Received into evidence.

The Clerk: They will be attached.

Q. (By Mr. Kenny): Referring to items 3 and 4 of the Pre-Trial Stipulation, on or about December 16, 1941, did you sign a document which I show you a photostatic copy of, purporting to be an extension of the agreement just introduced into evidence; and did you also on April 22nd sign a supplement to that agreement amending paragraph c?

A. I did.

Mr. Wall: I have the originals, Mr. Kenny. Would you like to use them?

Mr. Kenny: Yes. We ask, then, that the originals be introduced as a single exhibit, No. 16.

The Court: Is there objection?

Mr. Wall: No objection, no.

The Court: Very well, received as one exhibit, Exhibit 16.

Mr. Kenny: Item 29, gentlemen. [23]

Q. Did you receive a letter on September 9, 1942, from Dave Gesick, president of the Plomb Employees Association?

A. I received that. There was a deduction made from my commissions on this letter.

The Court: Please talk louder.

The Witness: Yes, sir.

The Court: Suppose you were talking to people back in the back of the room.

A. There was a deduction made from my commissions and this letter was written to thank me

(Testimony of Lionel H. Sanger.)

for the amount donated to the employees club, to the club house.

Mr. Kenny: We ask that that be received as Plaintiff's No. 17.

Mr. Wall: That is objected to, your Honor, as incompetent, irrelevant and immaterial; and also hearsay, not binding upon the defendant in that Mr. Gesick who signs the letter does not even purport to sign as a representative of the defendant. He appears to be, according to the letter, the president of Plomb Employees Association and not the Plomb Tool Company.

Mr. Kenny: I think perhaps the problem is best resolved by your Honor examining the document, because it has a picture on it of something that has to do with the Plomb Tool Company. At the bottom it says that Mr. Sanger's name is going to be on a plaque out there on Vernon Avenue.

The Court: Do you expect to connect this [24] up?

Mr. Kenny: Yes. I think item 47 will connect it up. I will not offer it at this precise moment.

The Court: Very well, upon counsel's assurance that he will connect it up, the objection is overruled and item 29, the letter of September 9, 1942, is received as Plaintiff's Exhibit 17, Mr. Clerk?

The Clerk: Right, your Honor.

Q. (By Mr. Kenny): On August 13, 1942, did you receive a memorandum from the Plomb Tool Company reading as follows:

(Testimony of Lionel H. Sanger.)

“Under separate cover I have sent you your 10-year pin. Congratulations!”

Mr. Wall: Is this item 47?

Mr. Kenny: This is item 47, yes.

Q. “You deserve a good room in the new club house so I am placing your name on the waiting list for the one overlooking the garden.”

I am offering that to connect up the other, and I am offering this for status. We offer that as Plaintiff’s 18.

Mr. Wall: May I ask a slight delay until I find this item?

Mr. Kenny: All right.

Mr. Wall: Well, that is objected to, your Honor, as incompetent, irrelevant and immaterial. I do not see that it serves the connecting-up purpose which Mr. Kenny indicates, nor do I see that the reference to a room in the club house [25] has any bearing upon any of the issues. Perhaps the reference to the 10-year pin may make it admissible for that purpose.

Mr. Kenny: The 10-year pin is to show status. The reference to the club house is to connect up with the letter from Mr. Dave Gesick about the employees’ club house that was the subject of an objection last made.

The Court: Very well, the objection is overruled and item 47 is received as Plaintiff’s Exhibit 18.

Mr. Wall: May I also, your Honor, move to strike, then, Exhibit 17, being the Gesick letter prior to this, on the ground that the Exhibit 18 just ad-

(Testimony of Lionel H. Sanger.)

mitted does not serve to connect it up and show the materiality?

The Court: The motion will be denied without prejudice to the renewal of it. There may be other evidence to connect it.

Q. (By Mr. Kenny): Do you know Dave Gesick?
A. No, sir, I do not.

Q. Item No. 6. Did you receive a letter from Plomb Tool Company on September 23, 1942, attaching a "Notification" item, which is item 5 here, relating to the handling of Government contracts in the war effort?
A. Yes, sir, I did.

Mr. Kenny: We ask that the letter of September 23 and the attached "Notification" be received as one exhibit.

The Court: That would be items 5 and 6? [26]

Mr. Kenny: Yes.

Mr. Wall: I have the original notification, Mr. Kenny.

Mr. Kenny: I have a duplicate original.

The Court: Is there objection to the offer?

Mr. Wall: No objection, your Honor.

The Court: Received into evidence as Plaintiff's Exhibit 19.

Q. (By Mr. Kenny): Item No. 30. You received a letter from Mr. Kerwin of the Plomb Tool Company on September 24, 1942, did you, Mr. Sanger?
A. Yes, sir.

Mr. Wall: Which item, Mr. Kenny?

Mr. Kenny: No. 30. I offer that as Plaintiff's No. 20.

(Testimony of Lionel H. Sanger.)

The Court: Is there objection?

Mr. Wall: Yes. That is objected to as incompetent, irrelevant and immaterial, and as having no bearing upon the status which I can see.

The Court: Overruled.

Mr. Kenny: Item No. 18. I think you have the original of this one, Mr. Wall.

Mr. Wall: 18?

Mr. Kenny: Yes.

The Clerk: The last one was admitted, your Honor, 20?

The Court: Yes. Objection overruled. Item 30 is received as Plaintiff's Exhibit 20. [27]

Q. (By Mr. Kenny): On October 17, 1942, did you receive an inter-office memo from Mr. Kerwin of the Plomb Tool Company, "Subject Draft"?

A. I did.

Q. And following the notation "I'm 5-A (bachelor with children?)" did you add this notation in typewriting that appears: "First allow me to say that I didn't" and so on, ending "Best regards, Lionel"? A. Yes, sir.

Mr. Wall: Here is the original, Mr. Kenny.

Q. (By Mr. Kenny): You did?

A. Yes, sir.

Mr. Kenny: I ask that that be received as No. 21.

Mr. Wall: No objection.

The Court: Received into evidence.

Q. (By Mr. Kenny): On October 27, 1942—this is item 27—did Mr. Morris Pendleton give you a letter signed by him, addressed to the "Office of

(Testimony of Lionel H. Sanger.)

Naval Officer Procurement, re: Lionel H. Sanger”?

A. Yes, sir, he did.

Q. Is this Mr. Pendleton’s signature?

A. Yes, sir.

Mr. Kenny: We ask that that be received as Plaintiff’s No. 22.

Mr. Wall: No objection. [28]

The Court: Received into evidence.

Q. (By Mr. Kenny): Did you write a letter on November 19, 1942, to a person named “Chris” at the office of the Plomb Tool Company in Los Angeles? A. I did.

Q. Will you state——

Mr. Wall: May I ask the item number?

Mr. Kenny: That is item 19. I am sorry.

Q. Will you state who Chris is?

A. Chris was Miss Christensen that was acting as either salesmanager or assistant salesmanager at that time—I believe salesmanager.

Mr. Kenny: I believe you have the original of that, Mr. Wall.

Mr. Wall: I have.

Mr. Kenny: We ask that be offered into evidence as Plaintiff’s 23.

Mr. Wall: No objection, your Honor.

The Court: Received into evidence.

Mr. Kenny: And I ask, Mr. Wall, if this memorandum in handwriting at the bottom of the letter is written, as far as you know, by Miss Christensen?

Mr. Wall: I have no information on it. I as-

(Testimony of Lionel H. Sanger.)

sume that probably is true from the initials, but I suggest that we stipulate that the hand-written portion be ignored. I do [29] not think it has any material bearing here.

Mr. Kenny: I would rather have it in.

Mr. Wall: May I consult with my client and then see if that is the lady's initials?

The Court: You are referring now to Exhibit 23?

Mr. Kenny: That is correct, your Honor.

Mr. Wall: Mr. Kenny, all I can state is that on comparing the initials with the signature of the young lady in question, they do not seem to compare; so I do not know whose they are. I will be glad to show you the comparison if you would like to see it.

Mr. Kenny: That is all right. Let us let it go in and stipulate that the pencilled notation may be disregarded.

The Court: Still referring to Exhibit 23, gentlemen?

Mr. Kenny: That is correct, your Honor. Item 28.

The Clerk: Shall I strike the pencilled notation to keep the record clear?

The Court: No. The stipulation will show in the record.

The Clerk: Marked 23.

Mr. Kenny: Item 28.

Q. Did you receive on December 11th, Mr. San-

(Testimony of Lionel H. Sanger.)

ger, a letter from Dillon Stevens on the stationery of the Plomb Tool Company?

A. Yes, sir, I did.

Q. Which reads: [30]

“To Whom It May Concern:

“Mr. Lionel H. Sanger has been employed by the Plomb Tool Company for over 10 years”?

A. Yes, sir, I did.

Mr. Kenny: We ask that be received as Plaintiff's Exhibit No. 24.

The Court: Received into evidence.

Q. (By Mr. Kenny): Did you receive a letter from Miss Christensen—this is item No. 48; it is also item No. 21; apparently we duplicated on that one—a letter from Miss Christensen of the Plomb Tool Company, dated December 24, 1942?

A. Yes, sir, I did.

Mr. Kenny: We ask that be received as Plaintiff's No. 25.

Mr. Wall: No objection.

The Court: Received into evidence.

Mr. Kenny: This is item No. 50.

Q. I show you a house organ of the Plomb Tool Company called “The Anvil Chorus,” Friday, January 1, 1943, and calling your attention to page 3, ask if the letter which is printed on that, headed “A Letter to Mr. Stevens ‘For the Plomb Gang’” and signed by “Lt. L. H. Sanger,” was written by you?

A. Yes, sir; it was written by me. That is a copy of it. [31]

(Testimony of Lionel H. Sanger.)

Mr. Kenny: We ask that page 3 of *The Anvil Chorus* be introduced as Nov. 26.

Mr. Wall: That is objected to, your Honor, as incompetent, irrelevant and immaterial, being dated January 1, 1943, which was after the plaintiff had gone into the armed forces, and has no bearing, no possible bearing on the issue of status or any other issue in the case.

The Court: Overruled. That is item 50?

Mr. Kenny: That is item 50, correct.

The Court: It will be received as Plaintiff's Exhibit 26.

Mr. Kenny: Item 49.

Q. Did you receive, Mr. Sanger, a letter from Dillon Stevens dated December 31, 1942, addressed to you at Quonset Point, Rhode Island?

A. Yes, sir, I did.

Mr. Kenny: We ask that that be received as Plaintiff's No. 27.

Mr. Wall: The same objection, your Honor, it being dated after the plaintiff's entry into the Navy, and as having in its text no bearing at all on the issue of status.

The Court: Objection overruled. It will be received as Plaintiff's Exhibit 27. I assume it is offered to show status?

Mr. Kenny: That is correct, and the [32] attitude. It is offered to do what Judge Minton referred to in his decision when he was still on the Seventh Circuit, to show the attitude of the company when they were waving the flag as against

(Testimony of Lionel H. Sanger.)

when they were up against their liabilities under the Selective Service Act. I will give the citation, your Honor. I think it is already in the pre-trial memoranda.

Item No. 61.

Q. On July 20, 1945, did you receive a letter from Mr. R. W. Kerr, vice-president and treasurer of the Plomb Tool Company, upon the stationery of the Plomb Tool Company?

A. Yes, sir, I did.

Mr. Kenny: We ask that that letter be received as Plaintiff's No. 28.

The Court: Is there objection?

Mr. Wall: No objection.

The Court: Received into evidence.

Q. (By Mr. Kenny): Now, that exhibit 28 contains a statement by you—no, a statement by Mr. Kerr, the first paragraph:

“Bill Wetz was in to see me the other day and that reminded me I owed you a reply to your note of May 15.”

Who is Bill Wetz?

A. Bill Wetz was one of my assistants that worked with me. [33]

Q. When did he start to work for you?

A. Offhand, I believe he worked for me about two years.

Q. And under what circumstances did you happen to hire him?

A. The Plomb Tool Company insisted that I have assistance in the territory and they wrote me

(Testimony of Lionel H. Sanger.)

to that effect and they loaned me a vehicle for the use of the man I was to hire.

Q. What kind of a vehicle was that?

A. It was a display vehicle. It was a half-ton or a three-quarter ton Dodge truck with special glass panel sides, displaying the Plomb tools only.

Q. And you hired Mr. Wetz at that time?

A. Yes, sir. I think Mr. Wetz—right after I got the truck was when I hired Mr. Wetz.

Q. Mr. Wetz went in the Navy, too?

A. Yes, sir.

Q. And he was in the Navy on July 20, 1945, when this was written, to the best of your knowledge?

A. Yes, sir.

Q. This exhibit also contains a statement by Mr. Kerr that he “owed you a reply to your note of May 15”?

A. Yes, sir.

Q. Have you a carbon copy of your note of May 15th?

A. No, I do not have, but I wrote Mr. Kerr. [34]

Q. What was the note of May 15th about?

A. I told him that I expected to be out of the service very shortly; I was very anxious to start in where I had finished, and just more or less along those lines; that I was anxious to get back with the Plomb Tool Company.

Q. What date did you get out of the service?

The Court: It is covered by the stipulation.

Mr. Kenny: Yes, I think it is.

Mr. Wall: Yes.

The Court: November of 1945, was it not?

The Witness: Yes, sir.

(Testimony of Lionel H. Sanger.)

Q. (By Mr. Kenny): And when did you come to Los Angeles? A. December, 1945.

The Court: We will take the noon recess at this time. Is there any objection to resuming at 1:30, gentlemen?

Mr. Kenny: None whatsoever.

Mr. Wall: It will be satisfactory, your Honor.

The Court: Very well, recess until 1:30 this afternoon.

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day, 'Tuesday, December 19, 1950.) [35]

Tuesday, December 19, 1950—1:30 P.M.

LIONEL H. SANGER

Direct Examination

(Resumed)

By Mr. Kenny:

Q. Mr. Sanger, at adjournment time we had brought you up to the point where you had come to Los Angeles after being mustered out of the service. Who did you first see at Plomb Tool Company upon that first visit in December, 1945?

A. When I first arrived I saw Mr. R. W. Kerr.

Q. In what position was Mr. Kerr? Was he still vice-president and salesmanager of the company? A. Yes, sir; I think he was.

Q. Was there anybody present at this first conversation you had with Mr. Kerr besides yourself and Mr. Kerr?

A. Mr. Pendleton came in shortly after we started.

(Testimony of Lionel H. Sanger.)

Q. Will you tell us what you said and what Mr. Kerr said when you two were together, and then when Mr. Pendleton came into the room? What was said by all three of you at that time?

Mr. Wall: If your Honor please, I object to the question as an attempt to duplicate or to vary from the stipulation of facts. The stipulation sets forth that the plaintiff sought reinstatement in the position that he had had prior to the war, and sets forth the offers made by the defendant. I see no need of going into those matters at this time if [36] it is intended merely to repeat what is in the stipulation. If it is an attempt to vary it, I think that would be improper and immaterial.

The Court: It may be an attempt to add to it, may it not? Is that the purpose of it?

Mr. Wall: That is possible.

Mr. Kenny: The stipulation, I believe, is in the usual form, that evidence not in conflict therewith may be offered.

The Court: Is it the purpose to add to?

Mr. Kenny: To amplify and add to, yes.

The Court: Very well. I assume there is no objection?

Mr. Wall: No; that is correct, your Honor.

The Court: You may proceed.

A. I talked to Mr. Kerr prior to Mr. Pendleton's arrival, and he told me that he certainly looked forward to having me with the Plomb Tool Company. But he told me that there was a research organization from the east working directly with

(Testimony of Lionel H. Sanger.)

Mr. Pendleton and that, of course, Mr. Pendleton would have the final say.

Q. (By Mr. Kenny): Now, what kind of a research organization did he say that was?

A. To assist in sales, and he mentioned they had recommended that all Plomb representatives carry only one line.

Q. All right; go ahead with your conversation with Mr. Kerr. [37]

A. When Mr. Pendleton then came in, he told me that he was sure glad to see me back and that I had done such an outstanding job—this was told after we had talked on the same subject about my representing the other firms having the other lines—and he said, “Well, we are certainly going to have to make some exception for you, Lionel.” So then we went—Mr. Kerr and I were the only ones in the conversation then.

Q. You mean that Mr. Pendleton left the room?

A. Yes. I believe he went to attend a meeting.

Q. All right. Then what was said between you and Mr. Kerr?

A. Then we talked about what had transpired while I was gone, how Mr. Friend or Freund, I believe it is pronounced, was working in that territory and that—

Q. Working in your former territory?

A. In my former territory.

Q. Yes.

A. And he said, “Would you like to carry your other lines and the Plomb line and work under Mr.

(Testimony of Lionel H. Sanger.)

Freund, whom we are thinking of sending to Chicago and combining the Chicago territory?" which I think consisted of Wisconsin, Indiana and Illinois. I am not too sure of the exact boundaries, "or would you like to come with us to work out of Chicago?" because they had practically no business in that area, and [38] "have Mr. Freund work for you and the men he now has working for him?" And I told him it meant not too much difference. He said he didn't think it advisable except that I drop the other lines and go with Plomb exclusively. But I told him I would drop the other lines if he would just give me some time to give these firms some notice, because these firms had paid me while I was in the service and Plomb had not. And he said, "Well, just drop them a note and tell them you have got something better, and that is all there is to it." And I said I just couldn't do a thing like that. I was bound loyally to them. They were square with me for four years away, pretty near four years, and I didn't feel that that was right. He said, "Well, let me talk to Morris Pendleton." So next day I saw him again and he said, "Well,"—

Q. Who was present the next day?

A. Just Mr. Kerr.

Q. And yourself? A. Yes, sir.

Q. All right. What was said on that occasion?

A. The next day he said, "Lionel, we are going to send for Ed Freund. We will have him out here. You just stand by." I believe it was about two or three days later that Mr. Freund arrived from Kan-

(Testimony of Lionel H. Sanger.)

City. He said, "Now, there is no use"—I came in again, and he said, "Now, you are going to have to give us time, a couple of days, with Freund to get [39] this thing straightened out."

Q. That was Mr. Kerr, is that right?

A. That was Mr. Kerr.

Q. What did he say?

A. So he said, "You call in every day and either contact me or my secretary, and we will have something final within a couple of days." I kept calling. Then after about the seventh or eighth day I couldn't contact either Mr. Pendleton or Mr. Kerr, and I think I was informed Mr. Pendleton had gone east. And I finally reached Mr. Kerr somewhere around the 18th of January, which was about three weeks after I was told originally to call every day, which I had done. He says, "Lionel, the best thing for you to do is to return to Kansas City, keep in touch with us and we will be in touch with you." So I wrote him several notes, never heard from them.

Mr. Wall: If your Honor please, I move to strike all of the testimony that this witness has just given relating to the purported offers made to him and his reply to those offers. I wish to call your Honor's attention to paragraphs 10 and 11 of the Stipulation of Facts on file here which states specifically the offers that were made to the plaintiff. He was offered a position as an employee, "selling exclusively the products of the defendant and its

(Testimony of Lionel H. Sanger.)

subsidiary corporations * * * either in the territory in which plaintiff had been [40] previously authorized to sell" before the war or in the "Chicago territory." He was told that if——

The Court: I have read it, Mr. Wall. You are just taking time.

Mr. Wall: I am sorry, your Honor. It seems to me that what the witness has just said is contrary in several respects to the terms of the stipulation.

The Court: It was not offered for that purpose and it will not be considered for that purpose, unless some development, but I do not care to measure the words of the witness against the stipulation and try to determine whether one amplifies or disputes the other. Motion denied.

Mr. Kenny: Items 25, gentlemen, and 26.

Q. On January 27th, from the Hotel Phillips, Kansas City, did you write a letter to Mr. Robert Kerr of the Plomb Tool Company?

A. Yes, sir, I did.

Q. Is this a photostatic copy of it?

A. Yes, sir.

Mr. Wall: I have the original. Would you like to see it?

Mr. Kenny: Fine. I will offer item 25 as Plaintiff's 29.

The Court: Is there objection?

Mr. Wall: No objection.

The Court: Received into evidence. [41]

Q. (By Mr. Kenny): And thereafter on the 31st of January did you receive a letter from Mr.

(Testimony of Lionel H. Sanger.)

Kerr of the Plomb Tool Company, item 26, addressed to you in Kansas City?

A. Yes, sir, I did.

Q. Is this a photostatic copy of that?

A. Yes, sir.

Mr. Kenny: Have you the original, Mr. Wall?

Mr. Wall: That is item 26?

Mr. Kenny: Yes.

Mr. Wall: No. All I have is the carbon copy retained in the Plomb files, addressed to the plaintiff. I assume he would have the original.

Mr. Kenny: We ask that the carbon copy furnished by counsel for the defendant be marked as Plaintiffs' Exhibit No. 30.

Mr. Wall: No objection.

The Court: Received into evidence.

Mr. Kenny: Item 62, gentlemen.

Q. And thereafter, on February 10, 1946, did you write a letter to Mr. Kerr on the stationery of the Hotel Continental, Kansas City, a carbon copy of which I now exhibit to you? A. I did.

Q. And I ask you if this is the carbon copy that I now exhibit to you? [42] A. It is, yes, sir.

Mr. Kenny: I ask that that be received into evidence as Plaintiff's 31.

Mr. Wall: That is objected to, your Honor, as incompetent, irrelevant, and immaterial, containing, as far as I can tell, principally self-serving declarations on the part of the plaintiff.

The Court: It is a part of a chain of correspondence, is it not?

(Testimony of Lionel H. Sanger.)

Mr. Wall: Well, it does not indicate—I will take it back, your Honor. It does indicate that it is a reply to a letter of December 31st.

The Court: Objection overruled. It will be received as Plaintiff's Exhibit 31.

Q. (By Mr. Kenny): Did you receive any reply to that letter which has just been received as Exhibit 31, that letter to Mr. Kerr?

A. I received a telegram later, I think. I am not sure right now if it was in reply to that, but it was a telegram saying that he was coming east sometime in March.

Q. Did you ever have any conversation with Mr. Kerr after that?

A. When he came east in March, around the first part of March, we had lunch together.

Q. Was there anyone else present at that [43] luncheon? A. No, sir.

Q. What did Mr. Kerr say and what did you say at that time?

A. Well, I thought he came prepared with some offer, as none had been made up to that time. And he told me that Mr. Pendleton was still of the same opinion that he was going to listen to this eastern research firm, and there was nothing he could do, but he would definitely let me hear from him and I would hear from either he or Morris Pendleton when he got back to California. I waited for that and never heard.

Mr. Wall: If your Honor please, without wishing to labor the point, I move to strike the testi-

(Testimony of Lionel H. Sanger.)

mony that says to the effect that no offer had been made up to that time, referring to March, 1946, because it is stipulated that the offers were made in January.

Mr. Kenny: I think it may go out as far as we are concerned. It is a conclusion. I was merely asking for the conversation.

The Court: Very well, that portion of the answer will be stricken.

Q. (By Mr. Kenny): Did you ever have any correspondence with Mr. Kerr or Mr. Pendleton or any official of the Plomb Tool Company after that?

A. Not after that, no, sir.

Mr. Wall: Was that March of 1946? [44]

A. Not after that March.

Q. (By Mr. Kenny): Did you ever have any conversation with Mr. Morris Pendleton after that?

A. No, sir.

Q. I show you a printed card that says "Plomb, Lionel H. Sanger, Representing The Plomb Tool Co.," and ask you the circumstances of how that came to be printed?

A. Those were the cards that were furnished by the Plomb Tool Co. to representatives and salesmen.

Q. About when would you say this particular card was furnished to you?

A. That card was furnished in either '41 or '42. I don't remember. As we ran out we would order more. Those were a standard card.

Q. And that was printed and paid for and given to you by the Plomb Tool Co.?

A. Yes, sir.

(Testimony of Lionel H. Sanger.)

Mr. Kenny: We ask that this card be received as Exhibit 32.

The Court: What is that item number?

Mr. Kenny: That is not itemized, your Honor. That is an added card.

The Court: Is there objection to it?

Mr. Wall: No.

The Court: Received into evidence. [45]

Mr. Kenny: I wonder if I may have Exhibit 1 for identification?

The Court: This chart, Mr. Clerk.

Q. (By Mr. Kenny): On Exhibit 1 for identification, Mr. Sanger, there are markings in ink for the years '43, '44, and 1945, showing receipts from Wohler, Powell Muffler, Eis Manufacturing Co., Precision Parts Co., and Pep Manufacturing Co., and I ask you if you put those figures on this diagram? A. I did.

Q. Will you state where you got those figures?

A. I took those figures from my books showing the income that I received, and that is the amount of money that was paid to me by the firms that you mentioned while I was in the service.

Mr. Kenny: You may cross-examine.

Q. (By Mr. Wall): Mr. Sanger, in your direct examination you testified——

The Court: Will you conduct the examination from the lectern, Mr. Wall?

Mr. Wall: Oh, I beg your pardon.

Mr. Kenny: If I might interrupt just a moment? Mr. Morris has called to my attention in the motion

(Testimony of Lionel H. Sanger.)

for summary judgment that long correspondence that went to whether or not the Statute of Limitations was tolled or not, and to save extending the record here, we would offer at this time the [46] affidavit and the exhibits of Mr. Sanger which were introduced at that time.

Mr. Wall: The affidavit and the exhibits?

Mr. Kenny: Yes. Yes, that is the affidavit which was filed April 10, 1950—not to the merits of the case, but merely out of an excess of caution on the issue of the Statute of Limitations.

The Court: The exhibits A to O attached to the affidavit?

Mr. Kenny: That is right.

Mr. Wall: If your Honor please, I have no objection to the reception of those exhibits for the limited purpose of showing the acts and correspondence involved during the period of delay. I would object to them if they were offered for any other purpose, and I do object to the offer of the affidavit of the plaintiff as such. It seems to me that that has now been superseded by our stipulations and by his testimony.

Mr. Kenny: I think that is probably right—just the exhibits that are attached to it.

Mr. Wall: Which, incidentally, are items 31 to 45, inclusive, in the stipulation.

Mr. Kenny: That is correct.

The Court: Do you have extra copies, or do you wish the copies attached to the Sanger affidavit filed April 10, 1950, to be marked in evidence, pursuant

(Testimony of Lionel H. Sanger.)

to your stipulation, as exhibits next in order? [47]

Mr. Kenny: I think that would be the best.

Mr. Wall: I think that would be satisfactory.

The Court: As I understand, it is stipulated that that correspondence did pass on or about the dates borne by the letters?

Mr. Wall: That is correct.

Mr. Kenny: And it is only offered on the issue of the Statute of Limitations or laches, because some of it is clearly inadmissible on the merits, and some of it even talks about a proposed settlement of the lawsuit.

Mr. Wall: That is correct. And there are legal briefs on both sides, too. I think none of it is offered for proof of the truth of the facts at all, but simply of the fact that those letters and pieces of correspondence did pass.

The Court: What items, now?

Mr. Morris: 31 to 45, your Honor.

The Court: Very well. Item 31 is received into evidence as Exhibit 33; item 32 will be Exhibit 34; item 33 will be Exhibit 35; item 34 will be Exhibit 36; item 35 will be Exhibit 37; item 36 will be Exhibit 38; item 37 will be Exhibit 39; item 38 will be Exhibit 40; item 39 will be Exhibit 41; item 40 will be Exhibit 42; item 41 will be Exhibit 43; item 42 will be Exhibit 44; item 43 will be Exhibit 45; item 44 will be Exhibit 46; and item 45 will be Exhibit 47 in evidence.

Does that complete the direct examination? [48]

Mr. Kenny: That completes the direct.

(Testimony of Lionel H. Sanger.)

Cross-Examination

By Mr. Wall:

Q. Mr. Sanger, you testified on direct examination that certain deductions were made from your commissions for a contribution to the Plomb Employees' Association club house, is that correct?

A. Yes, sir; that is correct.

Q. Do you recall the amount of your contribution to that?

A. It was, to my memory, \$50.00 or \$100.00.

Q. That was a voluntary deduction, a voluntary contribution, was it not, on your part?

A. No, sir. A letter was written by Mr. Dillon Stevens advising me that he had deducted whatever the amount was from my commission check and that the deductions were made in proportion to the salesmen's earnings. But I don't have the copy of that letter.

Mr. Wall: This is item 10 under the stipulation, Mr. Kenny.

Q. Mr. Sanger, I show you a letter dated March 29th, 1940, on the letterhead of "Kansas City Warehouse Service Co.," addressed to "Plomb Tool Co., Attention Mr. Morris Pendleton," and signed "Lionel." Is that your signature?

A. Yes, sir. [49]

Mr. Wall: I will offer this letter into evidence as the defendant's first exhibit, I guess.

Mr. Kenny: I will make the objection that it is

(Testimony of Lionel H. Sanger.)

immaterial and has no bearing on any of the issues in this case.

Mr. Wall: This is offered, your Honor, for the purpose of showing the actions of the parties under the relationship that they had, showing——

The Court: It is on the issue of status?

Mr. Wall: That is correct, your Honor.

The Court: Overruled.

Mr. Kenny: That being the case, your Honor, I will not press the objection.

The Court: Very well.

The Clerk: Defendant's Exhibit A.

Mr. Wall: Item 11 is the next one, Mr. Kenny.

Q. I show you a carbon copy of a memorandum to "Sanger" from "M. B. P.," dated April 15, 1940, on the subject of "K. C. Warehouse," Mr. Sanger, and ask you if you recall receiving the original of that? I might state to you that it has been stipulated that you did so receive it.

A. Yes, I did.

Mr. Wall: I will offer this as Defendant's Exhibit B, also on the issue of status.

The Court: Received into evidence. I assume there is no objection to that? [50]

Mr. Kenny: No objection.

The Court: Very well.

Mr. Kenny: It is all part of the correspondence between the parties here.

Q. (By Mr. Wall): In your direct examination, Mr. Sanger, I believe you testified that you hired

(Testimony of Lionel H. Sanger.)

Mr. Bill Wetz, I think it was, as one of your assistants? A. Yes, sir.

Q. When the company requested it or suggested it. I call your attention to this letter, Defendant's Exhibit A, dated March 29th, 1940, which you wrote to Mr. Pendleton; and I take it from that letter that you were then engaged in discussing with Mr. Pendleton over the possibility of moving the warehouse, is that correct, moving the Kansas City warehouse?

A. Yes, sir.

Q. Is it correct that you were opposing the moving of the Plomb stock from the warehouse where it was then located to another warehouse; is that true? A. Yes, sir.

Q. Calling your attention to Exhibit B, I note that in that letter from Mr. Pendleton to you, in the last paragraph he says: "I am instructed to say to you that you put on a much needed missionary man and we will leave the warehouse as is, and I think we will both be better off." Is that the [51] suggestion which you referred to in your direct testimony as a result of which you hired Mr. Wetz?

A. Not on this specific statement. There is another letter whereby—of course, they had been insisting on another man, but I think it was in another letter, saying something about additional territory and that I should put on another man to help cover, and then this man was for the territory without the additional territory.

Q. Did you after receipt of this letter of April

(Testimony of Lionel H. Sanger.)

15, 1940, Exhibit B, hire an additional man to use in your territory? A. Yes, sir.

Q. But that was not Mr. Wetz?

A. I think that was Mr. Wetz at that time; yes, sir.

Q. In other words, you think you did hire Mr. Wetz shortly after receiving this letter?

A. Yes.

Q. Did you have another employee in the territory at that point?

A. The other employee was furnished to me by the Plomb Tool Co. His name was Mr. Nate Needham. He was paid by the company.

Q. What were his duties?

A. His duty was also missionary work.

Mr. Kenny: May I interrupt to ask the witness to explain, perhaps to the court and to me, what missionary work [52] means?

The Witness: Missionary work is work done with the account that I would sell. In other words, he would help the customer, the customer salesman in selling tools to the garage, to ultimate sales.

Mr. Kenny: In other words, the missionary man helped your customer to resell the tools you sold him?

The Witness: Correct.

Q. (By Mr. Wall): And it is a fact, is it not, that the missionary man receives no commission from Plomb Tool Co. on those resales?

A. The one man being paid a direct salary and

(Testimony of Lionel H. Sanger.)

expense by the Plomb Tool Co., and I paid my assistant, I believe, a flat salary at the time.

Q. And this assistant of yours, Mr. Wetz, he is the one, is he, to whom you paid a flat salary at that time? A. Yes, sir.

Q. What did Mr. Wetz do in connection with your selling activities?

A. Mr. Wetz would distribute catalogs and help repair display boards and show new tools.

Q. He did whatever you asked him to do, is that correct?

A. Well, in the company contract we had to keep repair on display boards and it was quite a job.

Q. But he did whatever activities you assigned to him, [53] is that correct?

A. That is correct.

Q. I show you a letter dated—and this is item 12, Mr. Kenny—a letter on the letterhead of Hotel West, dated April 13, 1940, addressed “Dear Morris,” and signed “Lionel.” Is that your signature, Mr. Sanger? A. Yes, sir.

Q. And I take it this is in reply to the letter regarding the warehouse move which I have just shown you as Exhibit B, is that correct?

A. I think it is.

Q. And I note that you state in the second paragraph of your letter——

Well, perhaps I had better offer this into evidence first. May I offer this letter of April 23, 1940, item 12, into evidence as Defendant’s next exhibit?

The Court: Is there objection?

(Testimony of Lionel H. Sanger.)

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: C.

Q. (By Mr. Wall): I note that in that letter you state in the second paragraph:

“Regardless I am going to live up to my part of the bargain and will place the missionary man on at the earliest possible date.” [54]

Is that the Mr. Wetz that you have referred to, or the other missionary man?

A. That was Mr. Wetz.

Mr. Wall: That was Mr. Wetz. Item 13 is next, Mr. Kenny.

Q. I show you a copy of a Western Union telegram dated August 23, 1940, addressed to “Lionel Sanger” and signed “Winslow.” Do you recall receiving the original of that telegram?

A. Yes, sir, I do.

Mr. Wall: I will offer this as defendant’s next exhibit in order.

Mr. Kenny: No objection.

The Court: Which item is that, 13?

Mr. Wall: That is item 13, your Honor.

The Court: Received into evidence.

The Clerk: Exhibit D.

Q. (By Mr. Wall): I believe you stated in your direct examination this morning, Mr. Sanger, that the company made available to you a display truck, is that correct? A. That is correct.

Q. I note that in this telegram, Exhibit D, there is apparently some reference made to that truck. It

(Testimony of Lionel H. Sanger.)

states: "You Purchase Two Tires Jack and Have Top Repaired and We will Reimburse. Hereafter You Stand All Expense Operation [55] and Repairs." Do you recall whether that did refer to the display truck that you mentioned this morning?

A. That is correct.

Q. After that time did you pay the expenses of the operation of that truck? A. I did.

Q. This telegram was sent to you about the time the truck was first made available to you, was it not?

A. I don't remember that. I couldn't say. I think they had—there was an overhaul job on that truck, and I don't recall if it was made prior to this. It seems like afterwards there was considerable trouble with the truck and I wrote and told them about the additional repairs, and I think they okayed that. I don't really remember.

Q. It is stipulated in the Pre-Trial Stipulation of Facts here that the company did reimburse you for a certain amount—I have forgotten the dollar figure—for truck repairs. I take it that is the reimbursement referred to in this telegram, is that correct? A. It may be, yes, sir.

Q. And thereafter you paid all expenses of the truck. I note also that this telegram, Exhibit D, states: "Compensation Insurance on Assistant Undoubtedly Necessary But Your Concern Since He Is Your Employee." Do you recall whether that referred to your assistant, Mr. Wetz, that you [56] have mentioned? A. It does.

(Testimony of Lionel H. Sanger.)

Q. Did you pay the compensation insurance with regard to Mr. Wetz?

A. I did not carry compensation insurance.

Q. You did not carry compensation?

A. On one employee in the State of Missouri I don't think it is necessary.

Mr. Wall: Item 14 I have now, Mr. Kenny.

Q. I show you, Mr. Sanger, a letter on the letter-head of the Kansas City Warehouse Service Company dated January 16, 1941, addressed to "Dear Willie," and signed "Lionel." Is that your signature? A. Yes, sir.

Q. I notice that this letter shows "Kansas City Warehouse Service Company" and then has "L. H. Sanger" printed toward the upper left-hand corner. Did you have your office in Kansas City at the Kansas City Warehouse Service Company?

A. Yes, sir.

Mr. Wall: I will offer this as the defendant's next exhibit.

The Witness: At that time.

Mr. Wall: Yes, at that time. That is January, 1941.

The Court: Is there objection?

Mr. Kenny: No objection. [57]

The Court: Received into evidence.

The Clerk: E.

Q. (By Mr. Wall): That was in January of 1941, then, that you had your office at the Kansas City Warehouse Service Company? A. Yes.

Q. Did you own any financial interest in that company, Mr. Sanger?

(Testimony of Lionel H. Sanger.)

A. I think that was—I think I owned it slightly prior to that, a half interest, but I only had it a very short time and sold it.

Q. During the time that you owned that half interest in the Kansas City Warehouse Service Company did you maintain your office there?

A. I have never maintained an office except where the Plomb Tool stock was carried. In other words, I have never had a desk to date since 1932. It is just mail-forwarding service.

Q. But they did forward mail to you from the Kansas City Warehouse Service Company?

A. Yes, sir.

Q. Did you inform that company of your itineraries from time to time so that they could forward your mail?

A. They used to accumulate it and then I would write them and tell them where I would be for the week-end. [58]

Q. I call your attention, Mr. Sanger, to Defendant's Exhibit A, which is the letter from you to Mr. Pendleton dated March 29th, 1940, also on the letterhead of Kansas City Warehouse Service Company; and I call your attention particularly to the paragraph numbered "6," on the first page of that letter, and ask you if that refreshes your recollection as to whether or not you had a desk or an office at any point?

A. This desk here refers to property that I owned, and you see the address is different, if you notice.

(Testimony of Lionel H. Sanger.)

Q. Yes, I noticed that.

A. And this desk here is when I moved over. I owned half of the property that was used at 1606 McGee St.

Q. I understood you to say a few moments ago that you never had a desk or an office at any particular spot.

A. It was owned by me in the operation of that particular warehouse. It was not used by me, my personal use desk.

Q. But in this letter of March, 1940, Exhibit A, you state as an argument against moving the warehouse: "I have my trunks, desk, files, and personal belongings all at 1729 McGee"?

A. That is correct; because I was not married and I had no residence to store anything, and I had all my personal belongings in there, and this desk, you know, things that I owned in operating that where I was half owner.

Q. But you did not use that as a base of operations? [59]

A. Well, they forwarded my mail, but I was not active in that warehouse.

Q. Did the other lines which you represented at that time do their warehousing also at this Kansas City Warehouse Service Company?

A. Some did.

Q. The Plomb Tool Company line was not the only one of yours, then, that was warehoused there?

A. I think there were others at that time.

The Court: Please speak up, Mr. Sanger.

(Testimony of Lionel H. Sanger.)

A. There were others at that time. I am sorry.

Mr. Wall: I am showing him item 16, Mr. Kenny.

Q. This, Mr. Sanger, is a memorandum on the Plomb Tool Company inter-office memo form, dated June 24, 1941, addressed to you from "Kirwin" and bearing at the bottom of it a typewritten paragraph after which is the typewritten word "Lionel." Did you type or cause to be typed that latter part on the document? A. Yes, sir; I think I did.

Mr. Wall: I will offer this into evidence as Defendant's Exhibit F.

The Court: Is there objection?

Mr. Kenny: No objection.

The Court: Received into evidence.

Q. (By Mr. Wall): I would like to call your attention [60] to the language of this paragraph on the bottom of this memo, Exhibit F, that you have just stated you put on there, in which you say:

"No doubt you realize how important it is to me to have the stock in the same warehouse where my office is located and my new office address after the fifteenth or twentieth of July will be 1817 McGee Street in the Automobile Row, where I belong and where our stock belongs."

Do you still say that you did not maintain an office in Kansas City, Mr. Sanger?

A. I never have in my life.

Q. What did you refer to, then, when you said here that it was important to have the stock in the same warehouse where your office is located?

(Testimony of Lionel H. Sanger.)

A. The Plomb Tool Co. was going to move their stock to the Thompson Products Warehouse, which they had done, I believe, nationally, if not 100 per cent, except Kansas City.

Q. You mean Thompson Products Warehouse is a nation-wide organization?

A. It is a nation-wide organization, and Thompson Products would not forward mail for me, and I had had very bad reports on their service there. The customers didn't like the move and it would be difficult for me having no mail-forwarding service. I have never paid for any office in my [61] life. It is just that service they render, most warehouses render.

Q. Insofar as you had an office, it was located there at that warehouse, is that true?

A. I never had an office. All I had was mail forwarding. I have never had a chair, desk, or anything like an office, still don't.

Q. You opposed, did you not, the proposal that Plomb move its stock? A. Correct.

Q. To the Thompson Products Warehouse?

A. Yes, sir.

Q. You preferred, as you stated here, that it be kept where you had your mail-forwarding service?

A. Or moved to 1817, where I was going to move, because we were definitely moving from where I was at.

Q. You mean the warehouse company?

A. No, Plomb was going to move.

(Testimony of Lionel H. Sanger.)

Mr. Wall: I see. I would like to back up to item 15, Mr. Kenny.

Q. This is a letter, Mr. Sanger, on the letterhead of "The Sheridan Hotel" in Minneapolis, dated February 9, 1941, addressed to "Dear Glen," and signed by you. Do you recall signing that letter?

A. Yes, sir. [62]

Q. Is the "Dear Glen" referred to there Glen Crandall of the Plomb Tool?

A. Glen Crandall.

Mr. Wall: I will offer this as the Defendant's Exhibit next in order.

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: G.

Q. (By Mr. Wall): Next I will show you what is item 17 on the stipulation and which is a letter dated June 26, 1941, again addressed "Dear Glen," and signed "Lionel," on the letterhead of "Lionel H. Sanger." Do you recall signing that letter, Mr. Sanger?

A. Yes, sir.

Q. I take it that that relates, again, to this Thompson Warehouse move that you have already mentioned, is that correct?

A. Yes, sir.

Q. Now I call your attention to this letterhead. Was this your own personal business letterhead, Mr. Sanger?

A. That is my own personal letterhead.

Q. I note that at the top it says "Lionel H. Sanger" and gives your address and telephone number. Was that the address of this warehouse?

(Testimony of Lionel H. Sanger.)

A. That is the address of Plomb Tool warehouse. All my letterheads right straight through are the same address as [63] Plomb Tool warehouse.

Q. When you say "Plomb Tool warehouse" you mean where Plomb at the time was keeping its stock?

A. Keeping its stock.

Q. I note at the bottom of that letterhead in printing is the following legend: "Serving the automotive and industrial jobber."

A. Yes, sir.

Mr. Wall: I will offer this letter of June 26, 1941, item 17, as Defendant's next exhibit in order.

The Clerk: H.

The Court: Is there objection?

Mr. Kenny: No.

The Court: Received into evidence.

Mr. Wall: May I have Plaintiff's Exhibit 12? I have a photostatic copy of it now. Perhaps I can show that to the witness.

Q. I show you, Mr. Sanger, a photostatic copy of Exhibit 12 which was introduced by your counsel this morning, being a memorandum from Dillon Stevens to you dated February 20, 1940, on the subject of "Understanding Instructions—9800 Deal." Can you tell me from that memorandum and from your recollection what this "9800 deal" was?

A. Yes, sir. Up just previous to that date Plomb Tool Co. was not in a competitive position on screw drivers, and I [64] suggested to the company that they take several and put them in a display card and have a jobber buy so many of those on a deal. It happened to be the number of 9800 series of screwdrivers.

(Testimony of Lionel H. Sanger.)

Q. That was simply the number of the series of the numbers of tools involved? A. Yes, sir.

Q. And they accepted your suggestion, did they?

A. And they accepted the suggestion. It increased the sales volume.

Q. And I take it from this memorandum, Exhibit 12, that when the instructions came out on the deal, somehow or other you misunderstood them, is that correct? Isn't that the sole purpose of that memorandum?

A. It looks like a letter in answer to "How many can you sell"? or something to that effect.

Q. It all had to do simply with the arrangements for this particular merchandising deal which was being made available by the company at your suggestion, isn't that true?

A. That is correct.

Q. I refer again, if I may, Mr. Sanger, to Defendant's Exhibit E, which is the letter of January 16, 1941, on the Kansas City Warehouse Service Co. stationery. I note that that has your name printed in the upper left-hand corner. You used that stationery part of the time, and part of the time [65] you used your "Lionel H. Sanger" stationery that we have already seen, is that correct?

A. That, and then Plomb stationery when I had both. Plomb furnished me stationery with their name on, too.

Mr. Wall: I see. Item 22, Mr. Kenny.

Q. I show you, Mr. Sanger, a series of letters which make up item 22 in the Stipulation of Facts,

(Testimony of Lionel H. Sanger.)

the first being a letter on the letterhead of The Roosevelt Hotel in St. Louis, dated January 12, 1941, addressed "Dear Dillon," and signed "Lionel." Is that your signature?

A. Yes, sir.

Q. And "Dillon," I take it, is Dillon Stevens?

A. Yes, sir.

Q. And this letter refers to correspondence with the Miniature Train & Railroad Co. and states that there are enclosed with it several letters from that company, one being dated May 19, 1939, to you from that company; another letter being dated August 14, 1939, to you from that company; the next being dated May 3, 1940; and the last being dated January 8, 1941, all running from Miniature Train & Railroad Co. to you. Do you recall the transaction that that letter to Mr. Stevens relates to?

A. Yes, I do.

Q. Can you state in general what the transaction was?

A. I left this gentleman—Mr. Sturtevant, I think [66] his name is, that owned the Miniature Train & Railroad Company; and he is an inventor that invented a new torque type wrench which appeared to be a very good tool number. So I sold some for him. I mentioned it, I believe to Mr. Kerwin, and he asked to see if I could get the line for some of the Plomb Tool representatives, which I did. A number of us sold this wrench. Then I suggested to Plomb, after I saw it was going so well, that they put the wrench in their line.

(Testimony of Lionel H. Sanger.)

Q. You mean that they manufacture it or that they simply market it?

A. No, that they buy it from Miniature Train & Railroad Company. And I suggested to Mr. Sturtevant and he would have a better sales organization if he would turn the wrench over to Plomb. He said he wouldn't want to turn over the whole factory, but he would sell Plomb on a basis where their men could handle it and resell the tool. And he said he would give me \$100.00 when the deal was consummated if Plomb did accept it as a Plomb item under the Plomb name.

Q. That was to be compensation from his company to you for putting the deal together, is that right? A. Right.

Q. And then, as I take it from this letter, he did not pay you and you asked Plomb to pay you, is that correct?

A. I asked Plomb to see if they could collect—not "collect" so much, as deduct the \$100.00 from what they paid [67] Mr. Sturtevant.

Q. Did you eventually receive the \$100.00 from Plomb Tool Company?

A. From Plomb Tool Company.

Mr. Wall: I will offer these five letters as one exhibit next in order.

The Court: Item 22?

Mr. Wall: That is correct, your Honor.

The Court: Is there objection?

Mr. Kenny: No.

The Court: Received into evidence.

(Testimony of Lionel H. Sanger.)

The Clerk: It will be Exhibit I.

Q. (By Mr. Wall): Mr. Sanger, were you aware that the Plomb Tool Company had a profit-sharing plan available for its employees during the year 1942?

A. Yes, sir.

Q. Were you ever a participant in that profit-sharing plan?

A. You mean—I don't know if I am quite acquainted with it. Is that where you deposit so much money out of our commission check? Is that what you mean?

Q. No. I think it was a bonus type of profit-sharing plan. Did you ever participate in any such plan with the Plomb Tool Company?

A. I don't know. Are you referring to where we deposited [68] money to loan out to employees?

Q. No, no. I am referring to what is known as the profit-sharing plan of the Plomb Tool?

A. I am not familiar with it.

Q. Were you aware that the Plomb Tool Company had certain group insurance premiums available for its employees in 1942?

A. Yes, I was offered that.

Q. Did you participate in that?

A. No, sir.

Q. Were you aware of the retirement plan that the Plomb Tool Company had at that time?

A. I do recall something on retirement, yes, sir, but instead, I took out my own with Mr. Dillon Stevens of the Plomb Tool Company.

(Testimony of Lionel H. Sanger.)

Q. But that was not in his capacity as an officer of the Plomb Tool Company, is that true?

A. Well, he sold insurance in addition to being in the Plomb Tool Company.

Q. I mean the insurance was not connected with the Plomb Tool Company that you bought from him?

A. No, sir.

Q. Now, Mr. Sanger, I would like to show you photostatic copies of your income tax returns which your counsel has made available to me. First of all is a photostatic copy of a [69] certified copy of what purports to be your Federal income tax return for 1941. I believe you obtained this copy from the Government?

A. Yes, sir.

Q. Having misplaced your own retained copy?

A. Yes, sir.

Q. And is that your income tax return for 1941?

A. It is.

Q. You signed that at the bottom here where your signature appears?

A. Yes, sir.

Q. Did you prepare the return yourself, Mr. Sanger?

A. I always take it down to the Federal Building and have one of the income tax men fill them out.

Q. What about this statement "Commissions Received" that appears as an attachment to it? Is that in your handwriting?

A. That is in my handwriting.

Q. Is that same true of this "Statement of Traveling Expense" attached to it?

(Testimony of Lionel H. Sanger.)

A. That is typewritten.

Q. I mean the filled-in blanks, the hand-written portion, that is in your handwriting?

A. Yes, sir.

Q. I notice there after "Nature of Business" you have [70] stated "Manufacturers Agent"?

A. Yes, sir. I had "salesman" down and he said, "Well, you have more than one line." He said that would be confusing, and that was at his suggestion. And then I didn't have it alone one year, if you noticed. One year it is "salesman" and the next year I think it is "representative" and another one is "agent."

Mr. Wall: We will look at them, Mr. Sanger. I would like to offer the photostatic copy of the plaintiff's income tax return for 1941 as the defendant's exhibit next in order.

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: J.

Q. (By Mr. Wall): Now I show you a photostatic copy, Mr. Sanger, of what is apparently your retained copy of your 1942 return, is that correct?

A. Yes, sir.

Q. I note there that on the first page of the return where it asks for "(occupation)" you have stated "Manufacturer's Repr." Is that correct?

A. Yes, sir.

Q. And you have attached, as in the case of the other, a separate sheet showing "Commissions Re-

(Testimony of Lionel H. Sanger.)

ceived" from Plomb Tool Co. and from the other companies that you represented?

A. Yes, sir. [71]

Q. And you have also attached a second sheet entitled "Statement of Traveling Expense" and at the top it says "Name, Lionel H. Sanger; Nature of Business, Manufacturers Rep.," is that correct?

A. Yes, sir.

Mr. Wall: I will offer the 1942 return as Defendant's next exhibit in order.

The Clerk: K.

Mr. Kenny: No objection.

The Court: Received into evidence.

Q. (By Mr. Wall): I show you a photostatic copy of your retained copy of your 1946 Federal income tax return, Mr. Sanger, and I note there that you have designated your occupation on the first page as "Mfg. Rep.," again, is that correct?

A. Yes, sir.

Q. And again you have attached separate sheets showing income from various companies and business expenses?

A. Yes, sir.

Q. And on the "Business Expenses" sheet you state "Nature of Business * * * Manufacturers Agent"? A. Yes, sir.

Mr. Wall: This is 1946. I will offer the 1946 return as the defendant's next exhibit in order.

The Clerk: L. [72]

Mr. Kenny: No objection.

The Court: Received into evidence.

Q. (By Mr. Wall): I now show you a photostat

(Testimony of Lionel H. Sanger.)

of your retained copy of your 1947 return, on which I note that you have described your occupation as "Manufacturer's Agent." This time you have filled out the schedule of the return on "Profit (or Loss) from Business or Profession" and have stated the nature of your business as "Manufacturer's Agent"? A. Yes, sir.

Q. And you have attached a separate sheet showing your "Income" from the various companies that you were representing during that year?

A. Yes, sir.

Q. And likewise a separate sheet on "Business Expenses"? A. Yes, sir.

Mr. Wall: I offer the 1947 return.

The Clerk: Exhibit M.

The Court: Received into evidence.

Q. (By Mr. Wall): I show you photostatic copy of your retained copy of the 1948 income, which likewise describes your occupation on the first page as Manufacturer's Agent, and also the same designation being on the sheet regarding "Business Expenses"? A. Yes, sir.

Mr. Wall: I offer this as the Defendant's next exhibit [73] in order.

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: N.

Q. (By Mr. Wall): Now I show you a photostat of your retained copy of your 1949 return, Mr. Sanger, which again describes your occupation as being "manufacturer's agent" and states that you

(Testimony of Lionel H. Sanger.)

have no social security number, on the first page, is that correct? A. Yes, sir.

Q. And you have again attached a separate sheet showing sources of income from various companies that you represented during 1949, is that right?

A. Yes, sir.

Q. Now, on the second separate sheet that you have attached, entitled "Deductible Expenses," as I mentioned to your counsel this morning and to you before court, an adding machine check of the total of the figures listed there as expenses shows a total of \$11,364.46 as against the total of \$15,748.15 that you have on that sheet.

A. The reason for that is the money that I paid to Mr. E. J. Geary who is now working for me. When I copied this, I copied it pretty quickly and there was another sheet which should have been attached on here which shows what I paid him, and that is the difference between it. [74]

Q. Do you recall the basis on which you paid Mr. Geary? A. Yes.

Q. Was it a flat salary basis?

A. \$400 per month.

Q. \$400 per month?

A. And that is against commission, but he didn't work a full year. So I think that is the reason for that variation there.

Q. The discrepancy between the adding machine and your total is \$4,383.69? A. That is right.

(Testimony of Lionel H. Sanger.)

Q. You think that amount was paid to Mr. Geary? A. Yes, sir.

Q. But not included on this list?

A. That is correct.

Mr. Wall: I will offer the 1949 return as Defendant's next exhibit in order.

Mr. Kenny: No objection.

The Court: Received into evidence.

The Clerk: O.

Q. (By Mr. Wall): Have you had audits by the Bureau of Internal Revenue with respect to any of these income tax returns: 1941, 1942, or 1946 to 1949, inclusive?

A. I don't follow you. You mean where they called me in or something? [75]

Q. Yes. Have you had any audit in the sense of having any changes made in your income tax returns by the Government for those particular years?

A. No.

Q. And I take it that those returns correctly reflect the income received by you from the various sources shown there? A. That is correct.

Q. And I take it also that they correctly reflect your business expenses incurred during those years?

A. That is correct, up through, I think it was in 1942 I was called in and asked just a question regarding the laundry or something that was on there, and then they passed it and said that was all.

Q. No changes were made in the return?

A. No changes were made in it.

Q. I show you now, Mr. Sanger, a typewritten

(Testimony of Lionel H. Sanger.)

copy of a letter from you to your counsel, Mr. Morris, purporting to set forth your income for, I believe, the first 11 months of the year 1950, which he has furnished to me. Does that total of \$19,433.07 correctly reflect the income received by you during the first 11 months of 1950? A. Yes, sir.

Q. I note you state there "Salary paid out \$4,860.00"? A. Yes, sir. [76]

Q. To whom was that paid?

A. Mr. E. J. Geary.

Q. That is the same man who was employed by you during 1949, I take it? A. Yes, sir.

Q. Then you have "Expenses for traveling, etc. \$9,187.63"?

A. Yes, that is correct. It should have had everything figured in there, not to the penny, because I don't have my complete report. That is the actual income but I totaled my expenses in my head. It would not vary \$100.00 on that.

Q. That is, the expenses, allowing for not being exactly accurate, is that correct?

A. Yes. It would not be off any amount, but maybe some amount up to \$100.00.

Mr. Wall: Very well. I would like to offer the copy of this letter into evidence as defendant's next exhibit in order.

The Clerk: P.

The Court: Received into evidence.

Q. (By Mr. Wall): Calling your attention to Exhibit J, which is your 1941 return, Mr. Sanger—and this is another photostatic copy of it—I note

(Testimony of Lionel H. Sanger.)

that you have in one of the sheets attached there a heading "Salaries & Commissions Paid Out" and you have three names there: "A. C. Towne \$369.78." Who was Mr. Towne? What did he do for you?

A. Oh, Mr. Towne was the gentleman who was the partner [77] in that warehouse that I owned.

Q. In the Kansas City Warehouse Service Co.?

A. The Kansas City Warehouse. And he had lines. He was representing different factories, and when he sold out he was the one who gave me the Powell Muffler line and the Eis Motor Products Line, and that is what I paid him.

Q. You paid him that for those lines, is that it?

A. Yes.

Q. For turning the lines over to you?

A. Yes. He said that he would make efforts to sell the companies to let me represent them, sell the factories, if I would pay him one-half, I think it was six months' commissions, one half per cent.

Q. In other words, this \$369 amount that you paid Mr. Towne represented a portion of your commissions? A. That is correct.

Q. Earned on the line that he turned over to you, is that correct? A. That is correct.

Q. It was simply a deal you had made with him in connection with the transfer of the line?

A. That is correct.

Q. What about J. Miller, the next gentleman named there; you paid him \$315.00 according to the exhibit.

A. I paid him to do some missionary work.

(Testimony of Lionel H. Sanger.)

Q. And that is missionary work of the type you mentioned [78] here in helping your customers to resell your product? A. That is correct.

Q. I notice that you have "W. H. Wetz" and you paid him \$2,310.40. He was the assistant that you put on as your employee? A. Yes, sir.

Q. Did you pay him on a flat salary basis or how? A. I think I did.

Q. In any event you paid him during the year \$2,310.40? A. Yes, sir.

Q. Calling your attention to Exhibit K, which is your 1942 return, you have also there the item of "Salaries & Commissions Paid Out" and the only name there is "W. H. Wetz" for \$2,240. Was that the same flat salary arrangement?

A. Yes, sir, the same thing.

Q. Mr. Wetz was your only employee during that year of 1942? A. Yes, sir.

Q. In 1946, from your 1946 return which is Exhibit L, I do not find any deduction there for salaries paid. Did you have any employees during 1946?

A. No. I was not representing the Plomb. Wetz worked Plomb only when he was with me.

Q. So you had no employees, then, during 1946?

A. No, sir. [79]

Q. But in 1947, as indicated by Exhibit M, which is your 1947 return, you did pay \$1,300 in salary to Robert H. Callahan? A. Yes, sir.

Q. I take it he was employed to represent you

(Testimony of Lionel H. Sanger.)

in selling some of the lines that you then represented? A. That is correct.

Q. And in 1948, according to Exhibit N, your 1948 return, you paid R. H. Callahan \$100.00. I take it that is the same gentleman?

A. Yes, sir.

Q. And then you paid H. D. Farber \$2,107.80?

A. Yes, sir.

Q. Did Mr. Farber replace Mr. Callahan as your employee? A. That is correct.

Q. In 1949, although it was not shown by your return, you stated that you had another employee in that year? A. Mr. E. J. Geary.

Q. Mr. E. J. Geary. And you have him at the present time?

A. Yes, sir. He is still with me.

The Court: We will take the afternoon recess at this time.

Mr. Wall: Yes, your Honor.

(Short recess.) [80]

Q. (By Mr. Wall): Again referring to these income tax returns, Mr. Sanger, first, to Exhibit J, your 1941 return, as I understand it, that shows that you received during the year 1941 gross commissions of \$20,254.01, of which \$10,321.94 came from the defendant here? A. Yes, sir.

Q. And in 1942, as shown by Exhibit K, you received total gross commissions of \$24,141.56, of which \$14,830 came from the defendant, is that right? A. Yes, sir.

(Testimony of Lionel H. Sanger.)

Q. Against that, in each of those years, of course, you had certain expenses which you deducted in order to determine your net compensation. Skipping the year 1946, which was the first year after your return from the service, as shown by Exhibit L, your gross commissions received from all sources then was \$25,968, or slightly higher than in 1942?

A. Yes, sir.

Q. And then in 1947, as shown by Exhibit M, the gross income went up to \$27,277? A. Yes, sir.

Q. Then in 1948 there was a reduction to some extent in your total income which was \$22,900?

A. Yes, sir.

Q. Using gross figures all the way through?

A. Yes, sir. [81]

Q. And in 1949, the total from all of the firms that you represented was \$20,398?

A. Yes, sir.

Q. And in 1950, up to the end of November, the gross income, I believe, was somewhere around \$19,000 for this year up to date? A. Yes, sir.

Mr. Wall: We have prepared from Mr. Sanger's income tax returns which are now in evidence a summary showing of his earnings from each of the companies whom he represented in each of the years 1941, 1942, 1946 through 1949, and the first 11 months' figures for 1950. We have also taken from those income tax returns and from his statement for expenses, the business expenses shown on each of those returns, and have deducted the total expense from the total commissions in order to show his net

(Testimony of Lionel H. Sanger.)

earnings from personal services during each of those years in question.

I have furnished a copy to counsel for the plaintiff. I should like to offer this summary in evidence, subject to any corrections which may be indicated by a comparison with the income tax returns. We believe it to be correct.

The Court: Any objection to the summary?

Mr. Kenny: No objection. That is the same as our Exhibit 1, except we developed a few missing years.

The Court: Very well, received into [82] evidence.

Mr. Wall: Thank you, your Honor. I might say that there is one figure, being business expenses for the year 1949, which we have changed in pencil here. The figure which we originally had was the corrected figure on the addition there that I call to Mr. Sanger's attention, and we have now put in the total figure as shown by his return.

The Court: Very well.

The Clerk: Defendant's Exhibit Q.

Mr. Wall: There is one more exhibit which is referred to in the stipulation and is item 20.

The Court: According to my notes, items 9, 28, 23, and 24 have not been offered yet.

Mr. Wall: Items 9, 23, and 24 intentionally have not been offered by the defendant.

The Court: Items 9, 23, and 24 are not intended to be offered.

Mr. Wall: Item 20, the reply to which is already in evidence as Exhibit 25—is it? I would like to

(Testimony of Lionel H. Sanger.)

offer at this time item 20, which is a letter from Mr. Sanger to Chris dated December 17, 1942.

I show you that letter, Mr. Sanger. Who is Chris? Was that Miss Christensen? A. Yes.

The Court: Is there objection to the offer?

Mr. Kenny: No objection. [83]

The Court: It will be received as Defendant's Exhibit.

The Clerk: R.

Mr. Wall: I have no further questions, your Honor.

Redirect Examination

By Mr. Kenny.

Q. Mr. Sanger, who is Nate Needham whom you mentioned in your testimony under cross-examination?

A. Nate Needham is a former employee of the Plomb Tool Company who was assigned to me as an assistant by them.

Q. And that was in the years 1941 and 1942 that he was assigned to you as your assistant?

A. I don't recall the last date. It seems like '41. I think he died thereabouts.

Q. What did he do when he was assigned to you?

A. He would go to my customers and help their salesmen in disposing of merchandise, showing them how to sell Plomb Tools; and he would also assist me in repairing the display boards and checking catalogs to see if they were up to date, distributing small catalogs to the mechanics.

(Testimony of Lionel H. Sanger.)

Q. Repairing display board; would you tell the court what those display boards were?

A. The display boards were the boards that were furnished by the Plomb Tool Company to the jobber to be installed in the jobber's store, and they held the tools or a fraction of the tools for display purposes in that jobber's store. And it [84] was up to me as a salesman to keep that board in repair and clean. In other words, about once or twice a year, depending on the dust storms we had, all the tools would have to come down, those boards be washed and wiped off, sometimes revarnished and new brackets for new numbers of tools that were manufactured be installed on those boards.

Q. And did you do that work? A. Yes, sir.

Q. Were you furnished a special tool to do that?

A. I was furnished a complete tool kit with varnishes and paint and hammers and screwdrivers—everything necessary—and brackets.

Q. That kit was furnished you by the Plomb Tool Co.?

A. Yes, sir; and another kit with it to repair broken tools that the jobber would give us on regular calls.

Q. There was some discussion during cross-examination about your office in a warehouse in Kansas City. Did you ever have your name on any door or on any office in Kansas City? A. No, sir.

Q. Did you ever have a secretary?

A. No, sir.

(Testimony of Lionel H. Sanger.)

Q. Did you ever have anything other than a mail box in that office?

A. I didn't have a mail box. The mail would just be addressed there and the manager of the warehouse would [85] readdress it to where I was on the road.

Q. Now, you said that you bought insurance from Dillon Stevens?

A. Yes, sir.

Q. At that time Dillon Stevens was an employee of the company, the Plomb Tool Company?

A. He was the vice-president of the Plomb Tool Co.

Q. And on the side he sold insurance, was that it?

A. Yes, sir.

Q. That was his personal deal; the company was not in the insurance business?

A. Not to my knowledge.

Q. To the best of your knowledge?

A. No, sir.

Q. Are you ready to go to work for Plomb Tool Company if employment should be offered you at this time?

A. Yes, sir.

Q. Calling your attention——

The Court: Do you want to develop that in some detail?

Mr. Kenny: I think your Honor brings certain questions to my mind, but I think that answer is sufficient. I guess I could ask him the conclusion.

Q. Are you able to go to work for Plomb Tool Company at this time?

A. Yes, sir; I am able to. [86]

(Testimony of Lionel H. Sanger.)

The Court: Doing what and where and under what circumstances?

Q. (By Mr. Kenny): Under what circumstances would you be ready to go to work for Plomb Tool Company? What kind of an offer from Plomb Tool Company would you accept were it made now?

A. I would like to continue on my old basis. I tried to sell other tools since I was not re-employed, but it is pretty hard to do when I spent practically my whole life building Plomb. I go around and just can't seem to sell the others.

Q. Calling your attention to Exhibit P showing your 1950 income, there is an item of \$390.32 from Bingham Herbrand Corp. Is that a tool company?

A. That is a tool competitive to Plomb. I try to sell their line, to go around to old accounts where I have originally established the Plomb stocks. I just don't seem to be able to put up enough sales resistance against or to show reason enough why they should discontinue Plomb, because I was sold on Plomb myself and I still think it is the best tool manufactured.

Q. Are you still selling Bingham Herbrand tools? A. No, sir.

Q. You sold them in 1949 and 1950, but you did divest yourself of it sometime in 1950? [87]

A. I think it was a total of about eight or nine months.

Q. Of all these other accounts, none of them are tool accounts, is that correct?

A. The one line is Truecraft Tool Company, but

(Testimony of Lionel H. Sanger.)

they don't have the same type of tool as Plomb Tool Company. They have carpenters' tools which are not competitive to Plomb.

Q. Judge Mathes asked me the question and I in turn ask it to you: Under what conditions would you be willing now to go to work for Plomb Tool Company? In what territory, what lines, and whether or not you would be willing to work for them exclusively?

A. I would be. I would like my same territory back that I originally had.

Q. Would you be willing to work for them exclusively? A. Yes, sir, I would.

The Court: Would you work for them in any territory in the Middle West where the company wanted you to work?

A. I would, yes, sir. I would not like to change, but I would change.

Mr. Kenny: I did not get that.

The Witness: I said, I wouldn't like to change but I would change.

The Court: In other words, you would like your territory back or comparable territory? [88]

The Witness: Yes, sir.

The Court: If it would be the policy of the company to have the salesmen handle only that line, you would be willing to handle only that line?

The Witness: Yes, sir. I told that to Mr. Kerr at the time, and I also wrote him a letter there. There is a letter there I wrote and told him that, but I never heard from Mr. Kerr, and these offers

(Testimony of Lionel H. Sanger.)

they told me they made are all news to me. I am still waiting for an offer from the Plomb Tool Company.

Mr. Wall: For the purpose of the record, your Honor, I move to strike that testimony as contrary to the stipulation.

Mr. Kenny: I think we can examine the stipulation and the evidence, and I will stand on this testimony as offered as not being in conflict of the stipulation but in amplification of it.

The Court: Very well, the motion will be denied. As the court said before, unless I feel someone is relieved from the stipulation, I stand on the stipulation.

Mr. Wall: Thank you, your Honor.

Mr. Kenny: Yes. But I do not take it your Honor's position is that this is in conflict with the stipulation.

The Court: I am not passing upon that. As I said this morning, I do not care to sit down and try to measure these words against the words of the stipulation and determine [89] whether they amplify the stipulation or not. Out of whatever is said by this witness we will carve what is clear in the stipulation, and nothing will be permitted to conflict with the stipulation unless the party is relieved from it.

Mr. Kenny: No further questions.

The Court: Any recross?

Mr. Wall: One question if I may, your Honor.

(Testimony of Lionel H. Sanger.)

Recross-Examination

By Mr. Wall.

Q. As you have used this term, Mr. Sanger, on your redirect examination and in connection with this Nate Needham, do I understand that he was what you referred to in your cross-examination as a missionary man? A. Yes, sir.

Mr. Wall: I have no further questions.

The Court: You may step down, Mr. Sanger.

Mr. Kenny: A question has been suggested to me that might make it clear.

The Court: Just a moment.

The Witness: Yes, sir.

Mr. Kenny: Well, I think I might make that more clear from the documentary evidence that is in, rather than to produce it from this witness. And we have no further questions.

The Court: You may step down, Mr. [90] Sanger.

The Witness: Thank you, sir.

The Court: Plaintiff's next witness.

Mr. Kenny: I think as the only other matter for the plaintiff, we would like to have from the defendant the payments made to Mr. Freund or whoever else worked the territory that was formerly worked by Mr. Sanger, in the years 1946, '47, '48, '49, and the first 11 months of 1950.

Mr. Wall: Perhaps I had better tell you what I have and the form in which I have it, Mr. Kenny. I have here——

Mr. Kenny: Have you a copy of it?

Mr. Wall: Yes. I will hand it to you. And perhaps I had better explain it to you, because this apparently is going in on a stipulated basis, rather than the testimony.

The Court: Why not offer a stipulation on it, Mr. Wall? Suppose you offer a stipulation.

Mr. Wall: Very well. I offer to stipulate that the Plomb Tool Company paid to Mr. Freund the amounts of commission and reimbursed expenses shown on this sheet which I hold in my hand and which I will be happy to have marked as an exhibit, for the years there set forth, and those years are 1946, 1947, 1948, 1949, and the first 10 months of 1950 which is the latest figure we have, Mr. Kenny. You asked for 11 months.

Mr. Kenny: Yes. That is all right.

Mr. Wall: I should like to call attention to the fact [91] that this schedule which was made up for my purposes, and not Mr. Kenny's, shows the year 1949 broken down into the first nine months of the year separate from the last three months; then shows the total for the year, and it shows the first nine months of 1950 separate from October, 1950, that being to conform with our contention that if any damages are payable here, they are payable only with respect to the period after the filing of the complaint, which was in September of 1949, and only for the period of one year thereafter.

The Court: Do you accept the stipulation?

Mr. Kenny: Yes, we will accept that stipulation as far as it goes.

The Court: Do you wish to offer the document?

Mr. Kenny: And we will offer this as being the monies paid Mr. Freund.

Mr. Wall: Just before you offer it, Mr. Kenny, may I speak of something else, your Honor? We also have the monies paid to Mr. Freund by P & C Hand Forged Tool Company and Penens Corporation for the same periods of time, and I am perfectly happy to have those facts made available to the court.

I would state, in line with my comment in my opening statement, that we do not feel these figures on these three corporations during the period in question can properly be offered as a measure of damages, because the total of these [92] three would be to give Mr. Sanger the benefit of the exclusive representation job which he was offered and which he turned down.

Now, with that clarification——

The Court: Does it take the three of them to comprise what was one before the war? Is that it?

Mr. Wall: No, your Honor. These are on a different basis from what was one before the war. Before the war Mr. Sanger represented Plomb Tool Company. He did not represent Penens and P & C, but he did represent other accounts. The combination of these post-war figures for Plomb Tool Company, Penens and P & C represent the full-time efforts of the man who is in the job that Mr. Sanger was offered but which he turned down, together with

him having partial benefit, at least, of the assistance of other men who were also assigned to that territory.

The Court: Does the Plomb Tool Company income to this man Freund during these post-war few years indicate his earnings in a territory and under an arrangement which is comparable to that which the plaintiff had prior?

Mr. Wall: No, your Honor, they do not. They represent the earnings of Mr. Freund under an employment contract by which he spends his full time on sales of the products of Plomb Tool.

The Court: I am referring to Plomb Tool alone, now. My [93] question is directed to Plomb Tool Company products alone.

Mr. Wall: Well, I would answer it this way, your Honor: That the figures will show here the sales of Penens and P & C products are relatively small in comparison with the sales of Plomb products. I think I see what your Honor has in mind. This man sells three companies' products, and before the war Mr. Sanger sold six companies' products. To that extent there is a similarity, I agree with you.

The Court: I am referring only to the Plomb Tool Co. income. In other words, did he sell Plomb Tool Co. products under a comparable situation to that existing when the plaintiff sold?

Mr. Wall: He sold in a comparable territory, yes. He sold them on a commission, on the same general basis as Mr. Sanger did.

The Court: I am not referring to the business of the witness. I am referring to the arrangement.

Mr. Wall: The point I make is this, your Honor: Mr. Freund had less other things to do and he spent a greater portion of his time on Plomb Tool business, because he was employed 100 per cent on the business of Plomb and its two subsidiaries.

The Court: Wouldn't that go to the weight of it?

Mr. Wall: That may well be, and I am perfectly willing to have these figures presented to your Honor. I am simply [94] stating clarifications.

The Court: Do you wish to offer the schedule?

Mr. Kenny: I want to ask one question for the purpose of the stipulation, that is, that Penens and P & C are both wholly-owned subsidiaries of Plomb Tool.

Mr. Wall: That is correct. I will so stipulate.

The Court: As I understand, you have three separate sheets?

Mr. Wall: That is correct.

The Court: Three separate sets of schedules, one for——

Mr. Wall: P & C, one for Penens, and one for Plomb; that is correct.

The Court: Do you wish to offer all of them pursuant to the stipulation?

Mr. Kenny: Yes, I will now offer all three of those as a single exhibit.

The Court: They will be received as Plaintiff's Exhibit 48.

Mr. Kenny: Mr. Wall has been good enough to

explain the Exhibit 48 further. On the income from Plomb Tool the item shows commission and expense and his total take, and Mr. Freund's total take would be the two added together.

Mr. Wall: Correct. That, I think, is gross income; yes.

The Court: The expense column means an expense [95] allowance, is that it?

Mr. Wall: It is a reimbursement of expenses on expense accounts, your Honor; so that his gross earnings would be the total of the two columns in any particular year, and his net earnings after expenses would be the left-hand column.

The Court: Would be the "commission" column, wouldn't it?

Mr. Wall: That is correct.

The Court: So the "expense" column is merely a reimbursement column, is that it, reimbursement on a dollars and cents basis?

Mr. Wall: On the expenses, your Honor.

The Court: Yes, actual out-of-pocket expenses.

Mr. Wall: That is correct.

The Court: So we can disregard that, can we not?

Mr. Wall: I think so, as long as we are talking in terms of net.

The Court: It cancels itself out, doesn't it?

Mr. Kenny: It cancels itself out. Of course, Mr. Sanger's commissions in the old days were figured on what his gross was.

Mr. Wall: But we have through Mr. Sanger's income tax returns his net figures.

Mr. Kenny: Yes. I think for what it is worth, it will be very helpful. [96]

The Court: Very well.

Mr. Kenny: I do have one other problem, however, Mr. Wall. Does this cover all of the sales in the territory that was formerly Sanger's?

Mr. Wall: No.

Mr. Kenny: Can we develop that?

Mr. Wall: I seem to be testifying here. The territory, as is indicated in the stipulation, has at different times two, three or four men operating in the territory. The way it is set up is that one man in the territory, Mr. Freund, is the zone manager, and under the contractual arrangements between him and the defendant company he is entitled to commissions, basically entitled to commissions on all sales made into that zone. He has the privilege, however, with the company's approval, of asking the company to hire as an employee other men to assist him in the sales, and the zone manager, with the company's approval, can direct that a certain portion of the commissions earned by **the entire** zone be paid to these other men. But these figures that I have given you are the earnings of Mr. Freund, who is the zone manager, the head man, so to speak, in that zone, after there has been deducted from the total commissions earned in the zone the amounts which were actually paid as either salary or commissions to the additional salesmen operating in that territory, also as employees of the [97] defendant.

Mr. Kenny: Can you give us the figures, then,

that would be commissions earned by these other persons?

Mr. Wall: We can get those for you. I understood you wanted Mr. Freund's earnings.

Mr. Kenny: I did not know that Mr. Freund expanded to having other people participating in that money which was formerly derived from that area.

Mr. Wall: We have those figures, of course. I would say this, though, that I do not think the total zone earnings give a basis of comparison at all because that would represent the efforts of three or four men without deduction for the compensation which is paid to those men.

In other words, my theory is that if Mr. Sanger had taken the job that was offered to him, he would have had the job Mr. Freund has, but presumably he would not have been able to produce that much business all by himself; he would have had to pay other people to do it.

Mr. Kenny: I am putting that argument aside for later. I wanted, before I rested, to leave the trial open to those figures and subject to those figures coming in. We can then see where the figures lead us for argument later.

The Court: Wait just a moment. Do you wish to offer Plaintiff's Exhibit 1 for identification before you rest?

Mr. Kenny: Yes, I do.

Mr. Wall: I will renew my objection to the portions that [98] relate to the period prior to 1940 and to the portion that relates to the period during the war.

Mr. Kenny: We submit that there is no argument as to where the figures are derived from. It merely goes to their materiality.

Mr. Wall: That is right.

The Court: What is the purpose of the offer as to the years during which the plaintiff was in the service?

Mr. Kenny: Merely to illuminate his problem. The central problem, I think, that we have on these negotiations for reemployment was what his problem was as to disposing of other lines. And he has said, "Look, I can't get rid of them. They carried me during the war. I have got to have some notice to get rid of them." And this merely verifies that they were very generous in carrying him during that time.

The Court: Very well, objection will be overruled and Plaintiff's Exhibit 1 for identification will be received into evidence.

On the Schedule of Exhibits I direct attention to the fact that, according to my notes, Exhibits 9, 23, and 24 have not yet been offered.

Mr. Kenny: I think neither side desires to offer them.

Mr. Wall: That is correct, your Honor.

The Court: Very well. The plaintiff now rests?

Mr. Kenny: We rest, subject to these other figures as [99] to the other men which can be supplied.

Mr. Wall: I can have them for you in the morning. Do you want them broken down as to individual men?

Mr. Kenny: I would just as soon have them lumped together as a figure.

The Court: How much time will you require for the defendant's evidence?

Mr. Wall: For the defendant's evidence, your Honor, I would think we will probably require two and one-half or three hours.

The Court: Any objection to resuming at 9:30 tomorrow morning?

Mr. Wall: That is quite satisfactory, your Honor.

The Court: Is that agreeable to plaintiff to resume at 9:30 tomorrow morning?

Mr. Kenny: Very good, thank you.

The Court: Very well, we will take the recess at this time until tomorrow morning at 9:30. Court will adjourn.

(Whereupon a recess was taken until 9:30 o'clock of the following day, Wednesday, December 20, 1950.) [100]

Wednesday, December 20, 1950—10:00 A.M.

The Court: You may proceed in the case on trial.

Mr. Wall: May I express my appreciation for your Honor's indulgence in postponing the opening to 10 o'clock. I appreciate it.

Yesterday afternoon, your Honor, Mr. Kenny requested that we furnish him with figures on the earnings of the entire zone, which is substantially the territory which was formerly assigned to Mr. Sanger. I now have those figures.

Mr. Kenny: I suggest that I be handed them now. I can let my client examine them while witnesses are being examined, then we can ask what questions are necessary before they are introduced.

The Court: Very well.

Mr. Wall: I will hand you three sheets with two copies each, Mr. Kenny, one showing "Commissions and Reimbursed Expenses" paid to that territory by the Plomb Tool Company, and broken down to show the amounts paid to each of the salesmen, including Mr. Freund whose figures were given to you yesterday. The same break-down is made for P & C Hand Forged Tool Company on another sheet, and a similar breakdown for the Penens Corporation on another sheet covering the period from 1946 to the end of October, 1950.

The Court: Thank you. [102]

Mr. Wall: Do I understand, then, that the plaintiff has rested?

Mr. Kenny: We will have rested when we have these in. We have no other testimony, merely these figures on the issue.

Mr. Wall: Do you wish to put those in now?

Mr. Kenny: I want my client to have an opportunity to look at them, because these figures mean a lot more to him than they do to me.

Mr. Wall: Shall I proceed with our case, then?

The Court: Yes, you may.

Defense

Mr. Wall: I will call Mr. Robert W. Kerr.

ROBERT W. KERR,

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Robert W. Kerr, K-e-r-r.

Direct Examination

By Mr. Wall.

Q. What is your present business or occupation, Mr. Kerr?

A. I am the vice-president of the Bingham Herbrand Corporation.

Q. What is the business of the Bingham Herbrand Corporation? [103]

A. They are manufacturers of steel products, forgings, stampings, and tools.

Q. Is that corporation in competition with the Plomb Tool Company, the defendant in this action?

A. Yes, in part it is.

Q. You were formerly connected with the Plomb Tool Company, I believe?

A. I was executive vice-president of Plomb.

Q. When did you sever your connection with Plomb Tool Company? A. March, 1948.

Q. In January, 1946, were you then vice-president of Plomb Tool Company? A. Yes, I was.

Q. In that capacity were you in charge of the sales activities of the company?

A. That is correct.

(Testimony of Robert W. Kerr.)

Q. Were you connected with the sales activities of the company in the period 1941-1942?

A. No, I was not.

Q. You were employed by the company at that time?

A. That is correct. I was the treasurer of the company at that time.

Q. At that time I believe Mr. Dillon Stevens was the salesmanager, entitled vice-president in charge of sales, is that correct? [104]

A. That is correct.

Q. When did you take over the supervision of the sales activities of Plomb Tool Company, if you recall?

A. In September of 1944.

Q. At that time, Mr. Kerr, in September of 1944 when you took over the sales management job, if I may use that term, what was the policy of the company with respect to arrangements that it had between itself and sales representatives selling its products?

A. You mean as to the status of the employment of such representative?

Q. That is right.

A. Well, at that time the company, of course, in the period from 1940 on had substantially expanded its production and distribution, and as a part of the program they had converted their sales organization largely from manufacturers' agents or independent contractors to direct employees of the company.

Q. Are you familiar with the circumstances which led to that conversion?

(Testimony of Robert W. Kerr.)

A. Yes, in general I am. I was not a part of it originally but I know why it was done.

Q. You were an officer of the company, though, at the time the change was made?

A. That is correct. [105]

Q. Can you state generally what those circumstances were?

A. Well, the principal reasons for it were, in the first place, the sales management at the time felt that because of the increased activity, the expanded sales, it was necessary to have the field organization under their direct control, which had not been true of the manufacturers' agents.

In addition to that there had been growing for some time and, in fact, had continued through a period of years there, and still exists, feeling on the part of many of the customers of that company as well as others in the same field that they preferred to deal with men who were direct representatives of the company and under their control. Those were the two principal reasons. Tied into that, of course, was the fact that where previously the company was small, its sales were not large enough to in some cases justify the expense of a direct representative, but those circumstances have changed.

Q. Do you know, Mr. Kerr, when the change of policy was put into effect?

A. As I recall, it was January of 1941. It was either 1941 or '42. I am not certain of it. I would have to check the records.

(Testimony of Robert W. Kerr.)

Q. Are you acquainted with Mr. Lionel Sanger, the plaintiff in this case?

A. Yes, very well. [106]

Q. You have known Mr. Sanger for some years, I take it? A. Since 1938.

Q. You were aware of the fact, I assume, then, when he went into the Navy service in the year 1942? A. That is correct.

Q. Did you have a conversation or several conversations with Mr. Sanger in January of 1946?

A. Yes, several of them.

Q. Where were those conversations held?

A. In Los Angeles at the Plomb Tool Company headquarters.

Q. Directing your attention to the first of what you have referred to as several conversations, will you state in general what—in the first place, who was present, if you recall? Was there anyone there besides yourself and Mr. Sanger?

A. Well, as I recall, on the majority of the occasions they were conversations between Mr. Sanger and myself, although on various occasions Mr. Pendleton, the president of the company, sat in with us; and on one or two occasions, as I recall, Morris Mautner, who was the personnel director of the company, participated in the discussion.

Q. Will you state in general what was said by Mr. Sanger and by you in the first of these conversations?

A. Well, these conversations, of course, resulted from earlier conversation in Chicago. In December

(Testimony of Robert W. Kerr.)

of 1945 there had been a meeting there of the automotive service [107] industries, the first one following the war activity.

Q. Was that a regular annual meeting?

A. That was a regular annual meeting; that is correct. It had been suspended during the war and this was the resumption of it. And Mr. Sanger came to me at that time and then said that he would like to go back to work for Plomb. He was wondering when he could be reinstated. And at that time I explained to him what our present or our then existing policy was, and we were under conditions where it was not easy to talk. He told me he was coming out to the West Coast later, and we agreed that we would talk the thing over then.

Q. So then I take it he did come out to the West Coast and you saw him here in January, is that correct?

A. That is correct, yes.

Q. Now, will you state the substance of the conversations between you and Mr. Sanger here along in January of 1946?

A. Well, Mr. Sanger came in then and said he was ready and willing to go back to work. And again I explained to him the change in the policy of the company, told him that as far as I was concerned and, I believe, as far as the company was concerned, we would like very much to have Mr. Sanger back, but pointed out that in the interval between the time he had left and January of 1946, due to circumstances which I explained and which have been discussed here, that we had [108] converted to our own

(Testimony of Robert W. Kerr.)

direct sales force; that the territory which he had previously covered on a part-time basis, carrying his other lines, was now being handled by three full-time men; that our distribution, of course, was much larger, our over-all program throughout the country was much larger; and that if he came back to the Plomb organization that it would have to be on a full-time basis.

Q. Did you tell him at that time, Mr. Kerr, that he could come back to the Plomb organization, taking that territory on a full-time basis as you have mentioned?

A. Well, that is correct. We discussed a good many possibilities at the time, and the stumbling block, of course, was the full-time basis.

Q. What did Mr. Sanger say, if anything, with respect to his willingness or unwillingness to come back on the full-time basis?

A. Well, his position was that several of the companies that he had previously represented and was continuing to represent as of that time—I recall particularly the Wohlert Company was one of them—had kept him on their payroll during the war, had compensated him to some extent during that period, and as a result he felt obligated to them, and therefore was unwilling to take the step that he felt would not be fair to them. In other words, he was unwilling to give up his other lines. [109]

Q. Now, you said, I believe, that in addition to his former Kansas City territory, if I may refer to it in those terms, you discussed other possibilities.

(Testimony of Robert W. Kerr.)

Will you tell us what you discussed in the way of other possibilities?

A. Well, as I said earlier, there were a good many conversations over a period of several days. In fact, as I recall, it ran for a couple of weeks. And we discussed the possibilities of the Kansas City territory. I made it clear at the time that if he went back to that territory, it would have to be on a full-time basis and with the additional manpower on the same basis as then existed.

Q. What do you mean by that, Mr. Kerr?

A. Well, at that time we had the three full-time men, a man by the name of Freund, who was the district manager, and he had two men working full time for him covering that territory.

Q. Do you mean by what you have said, then, that you told Mr. Sanger that if he took that territory he would become the district manager, but you would expect him to have as many assistants in the territory as Mr. Freund then had?

A. Well, that was always stipulated and understood; that is correct.

Q. What other possibilities did you explore?

A. We also explored the possibility of the so-called Chicago territory, which at that time was not functioning to [110] our liking, and we made a proposal on that; in other words, offered him that, and in connection with it, it was agreed that at least temporarily that one would give him an opportunity to carry his other lines until he could in a fair way give them up. In other words, to make

(Testimony of Robert W. Kerr.)

myself clear there, the Kansas City territory had become a very active territory. It required considerable attention, and as a matter of fact the three men who were then covering it were not giving the type of coverage that we felt it should have. The Chicago territory, on the other hand, was one that had not had the same type of attention as had been given Kansas City, and I had a good deal of respect for Mr. Sanger's ability, and proposed that as a possibility, with the understanding that in that case he would have an opportunity to release his other lines gradually.

Q. Did Mr. Sanger ask you for the right to continue his other lines over any specific period of time in connection with these discussions?

A. There was never any specific time suggested, although—and I do not recall whether it was in the conversations in Los Angeles or subsequently in Kansas City—that he said that he would have to have it at least a year before he would give up the other lines.

Q. You were not present in the courtroom yesterday, were you, Mr. Kerr? [111]

A. No. I did not——

Q. Did you hear Mr. Sanger's testimony?

A. No.

Q. I believe I can paraphrase Mr. Sanger's testimony accurately. Yesterday he testified in connection with these discussions that he had asked for time within which to sever his connections with his

(Testimony of Robert W. Kerr.)

other lines, and that you refused to give him any time, I believe is what he said. Is that or is that not a fact?

A. Well, in connection with the Kansas City territory my recollection is that that was correct, that we agreed, naturally, the assumption all the way along would be that it would have taken a short time, 30 days or thereabouts, to release the other lines in which he was active, but we were unwilling in that particular territory, which needed full-time representation, to give any extended time such as apparently he would want.

Q. Such as a year that you mentioned?

A. That is correct.

Q. In the course of these discussions in Los Angeles in January of 1946, Mr. Kerr, did you discuss with Mr. Sanger the commission rates which the company then had in effect in the Kansas City territory?

A. Yes, that is correct. We explained the change that had been made there. [112]

Q. What did you tell him in that regard?

A. Well, early in 1944—well, I am not certain of the date of that, again—but during that period prior to the time that I took over the sales organization we had established a new policy. The company felt that with the termination of war facing it, that it was going to have to aggressively campaign for additional distribution, and this new program was set up which involved two major steps; one of them was the reduction in prices on the tools that were sold, and the other one a reduction in the

(Testimony of Robert W. Kerr.)

rates of commission that were paid, the theory being that the lower prices and the additional merchandising activity would increase volume and that the men on the lower rates of commission would actually make more money than they had before; and, of course, that proved to be true.

Q. Do I understand, then, that the commission rates in effect in the company in January of 1946 were lower than those which had been in effect in 1942 when Mr. Sanger left?

A. That is correct. As I recall, the commission rate in Mr. Sanger's territory had been 10 per cent at the time he left. Prior to that it had even been more. Under the new program that was reduced to seven and one-half per cent.

Q. And you discussed this change of commission rate with Mr. Sanger in January?

A. That is correct; yes. [113]

Q. I believe you mentioned, Mr. Kerr, that Mr. Freund was in January, 1946, district manager of the Kansas City territory?

A. That is correct.

Q. And that there were other men also working in that territory?

A. That is right.

Q. Did you explain to Mr. Sanger in January, '46, the basis of your then setup on the handling of the territory by one district manager in several districts?

A. Yes. That was discussed at length on several occasions.

(Testimony of Robert W. Kerr.)

Q. Will you state as briefly as you can what you told him in that regard?

A. Well, again, the same story, that because of the new program we required the—in other words, we had set up a district arrangement, of which that Kansas City territory became one, with a district manager in charge, and depending upon the sales potential of each district, the district manager was required to carry in his organization and share in the earnings of the territory these other full-time men. In that particular territory it happened to be at the time two men.

Q. Were these other two men, the assistants to the district manager, so to speak, were they employees of the Plomb Tool Company at that [114] time?

A. Yes, they were.

Q. And how were they compensated?

A. They received a share of the earnings of the territory.

Q. How was that share determined?

A. Well, again, that was arbitrarily determined on the basis of the volume produced in the territory. It depended upon the number of men involved and the amount of earnings. As I recall in that territory, with the three men, Mr. Freund, the district manager, my recollection was that he received 40 per cent of the earnings and the other two men 30. That may not be correct because the percentages varied in different territories.

Q. Were these percentages set up by agreement

(Testimony of Robert W. Kerr.)

between the district manager and the company, if you recall?

A. That is right, and the men involved.

Q. In other words, as I understand it, then, the earnings of the particular territory or district in the form of commissions were divided between the manager and the other salesmen in the territory in accordance with an agreed ratio or something of that sort?

A. That is right. The procedure was, the earnings for the territory were computed, the men reported their expenses, those were deducted, and then the remainder was divided according to a pre-determined formula. [115]

Q. And did you explain that basis of arrangement to Mr. Sanger in January? A. Oh, yes.

Q. Did you tell Mr. Sanger in January of 1946 that before you could make any proposition to him you would have to consult with Mr. Freund who was then the district manager in the Kansas City territory?

A. No, not in that form. My recollection there, again, would be that at the time of the discussion I had told him that any move of that kind involving a change in Mr. Freund's status would naturally be discussed with him before it was made firm.

Q. In other words, you were contemplating replacing Mr. Freund with Mr. Sanger?

A. That is correct.

Q. Did you talk to Mr. Freund during the month of January, 1946?

(Testimony of Robert W. Kerr.)

A. Yes. Mr. Freund came to Los Angeles and we discussed the situation with him.

Q. Did he come to Los Angeles at your request or voluntarily? A. He came voluntarily, yes.

Q. Do you know what led him to come to Los Angeles at that time?

A. Well, apparently he had heard of the discussions with Mr. Sanger and he felt that he wanted to get in on it. [116]

Q. In the course of your discussions with Mr. Sanger in January of 1946 did you mention to Mr. Sanger some market research study that had been or was being made for the company in regard to sales methods?

A. I assume that incidentally that was mentioned. There had been a research made and studies on our marketing program by an industrial engineering firm, and their recommendations confirmed the program that we had established of using only our direct sales organization and breaking the country up into these sales districts.

Q. That study had been made prior to your talk with Mr. Sanger? A. That is correct.

Q. You mentioned, Mr. Kerr, discussions concerning the possible assignment of Mr. Sanger to the Chicago territory. Did Mr. Sanger evince interest in the Chicago territory at that time?

A. Oh, yes.

Q. But did Mr. Sanger at that time express his willingness to take the Chicago territory on the basis on which you offered it to him?

(Testimony of Robert W. Kerr.)

A. No. No, he did not. He expressed interest in it, and it is my recollection that right after that was discussed was when he returned to Kansas City, with the understanding he wanted to think it over. We wanted to do the same thing, [117] and the agreement was we would get together later for further discussion.

Q. Then I take it that Mr. Sanger returned to Kansas City at the conclusion of your talks in January? A. That is correct; yes, sir.

Q. I show you, Mr. Kerr, a photostatic copy of Exhibit 29, which I believe counsel has, which is a letter dated January 27, 1946, addressed to you and signed "Lionel" on the letterhead of the Hotel Phillips in Kansas City. Do you recall receiving that letter from Mr. Sanger? A. Yes, I do.

Q. I show you a photostatic copy of Exhibit 30, which purports to be a carbon copy of a letter from you to Mr. Sanger dated January 31, 1946. Do you recall sending that letter to him?

A. Yes, I believe I did.

Q. I also show you, Mr. Kerr, a photostatic copy of Exhibit 31, which is a letter from Mr. Sanger to you on the letterhead of Hotel Continental in Kansas City, dated February 10, 1946, and I will ask you if you recall receiving that letter from him?

A. Yes. Yes, I recall that letter.

Q. I call your attention to the third from the last paragraph on the second page, in which Mr. Sanger says:

"My loyalty will not allow me to leave the [118]

(Testimony of Robert W. Kerr.)

other firms that I represent, at this time, to go with Plomb exclusively. I am going to give them representation at least until the first of the year."

That, I take it, was in accordance with the statements he had made to you during his January conference, is that correct?

A. That is correct, yes.

Q. Did you subsequently see Mr. Sanger in Kansas City in March of 1946?

A. Yes, I did.

Q. Was that the first time you saw him after your meetings in January here in Los Angeles?

A. Yes, it was.

Q. Where did you meet him in Kansas City, if you recall?

A. As I recall, I think it was at the Muelbach Hotel in Kansas City.

Q. Was there anyone else present but you and Mr. Sanger?

A. No, just the two of us. We had lunch there.

Q. Did you at that time discuss with Mr. Sanger his application for reinstatement? A. Yes.

Q. Will you state, please, what was said by you and by him on that occasion?

A. Well, the conversation, as I recall it, lasted for [119] at least an hour, possibly longer than that. And again, we discussed all of the phases that we had previously, and at the outset my recollection of that is rather clear. I believe that Mr. Sanger was ready to say that he was willing to give up his other lines and come with Plomb, but as the discus-

(Testimony of Robert W. Kerr.)

sions went along, why, he came back to his same position, that he just felt that he could not personally afford to. On one hand, he told me what he was making from some of his lines, and then he also said that he just felt that they had been loyal to him and he loyal to them, and he did not feel like he could give up the other lines. After a discussion of some time, as I have said, he finally said: Well, if he could not go back on the old basis that he had been previously—that he felt he was entitled to go back on the old basis—that if he could not go back on that basis, he had no alternative but to take the matter up with the Veterans Administration.

Q. And when you say “the old basis” did you understand him to mean by that his old manufacturers’ representative basis?

A. That is correct.

Q. And continuing to represent other lines?

A. Yes.

Q. Did you at that time in Kansas City, in March of 1946, tell Mr. Sanger that you were willing to have him come [120] back into the Kansas City territory on the full-time basis that you have mentioned before?

A. Yes. All of the discussion was always on the basis of full-time representation; that is correct.

Q. Was there any further discussion at that time of the Chicago territory?

A. I believe there was. I would not say definitely, but again, I think we covered pretty largely

(Testimony of Robert W. Kerr.)

the same territory we had gone over in Los Angeles.

Q. When did you next see Mr. Sanger, if you recall, Mr. Kerr?

A. I don't believe I saw Mr. Sanger again until after I had left Plomb Tool Company. I may have seen him in Chicago at the time of the A.S.I. Show in December of 1947, but I am not clear on that.

Q. Do you recall whether or not you saw Mr. Sanger and had a conversation with him in Atlantic City in December of 1946?

A. That is right. Yes, we did. Mr. Pendleton and I together had a conversation with him there.

Q. What was the occasion? How did it happen you were at Atlantic City?

A. Well, this was the second one of the A.S.I. meetings. I spoke earlier at the one immediately following the war in Chicago. This was the resumption of their show. [121]

Q. I don't recall whether you stated or not, but what does A.S.I. stand for?

A. That is the Automotive Service Industries.

Q. And you did see Mr. Sanger then in Atlantic City, New Jersey?

A. That is correct, yes.

Q. And that was in December of 1946?

A. Right.

Q. Did you have any discussion with him at that time regarding his possible reinstatement with the Plomb Tool Company?

A. Yes. He and Mr. Pendleton and I had a session together at that time.

(Testimony of Robert W. Kerr.)

Q. Can you state what was said at that meeting, Mr. Kerr?

A. Well, again, Mr. Pendleton and I took the same position—and I think we genuinely meant it—that we would have liked to have had Mr. Sanger back, that is, if he would come in on the full-time basis. And again, he made it clear that he did not feel that he could properly give up his other connections.

Q. Did you tell him at that time that he could still come even then, come back to the Kansas City territory on the full-time basis?

Mr. Kenny: I submit that it is somewhat leading. It would be objectionable. I think that the conversation of [122] what was actually said the witness can testify to, but the business of counsel——

Mr. Wall: I will withdraw the question.

Q. Was there anything else said between you at that meeting, Mr. Kerr?

A. My recollection of that meeting, Mr. Wall, was that the discussion was very general. At the time there was no specific territory discussed. The one thing that was discussed was the policy of requiring full-time representation.

Q. Now, Mr. Kerr, if I may go back just a little bit in your testimony, in the January, 1946, period when you said that you discussed with Mr. Sanger the commission rates that were then in effect, which I think you said were seven and one-half per cent, at that time in January of 1946 did this reduced

(Testimony of Robert W. Kerr.)

commission rate of seven and one-half per cent apply to all sales representatives then connected with the company? A. Yes, that is right.

Q. In January of 1946, Mr. Kerr, were all of the sales representatives of the company on an employee full-time basis such as you have described?

A. At that time all but one, Mr. Schrenker.

Q. Mr. Schrenker? A. That is correct.

Q. Was he still an independent contractor?

A. He was still an independent contractor. [123]

Q. Will you please state what the circumstances were which led you to leave him on the independent contractor basis?

A. Well, he had remained on that basis by agreement with my predecessor for various reasons. The principal one was, as I recall, that he had brought into his employ two other men who had taken over the representation on his other lines, and he had given us our assurance that he was devoting practically 100 per cent of his time to the Plomb line personally. In spite of that, why, I had been putting the pressure on him at that time to change over and, as a matter of fact, had told him that it would have to be done very shortly.

Q. Do you know how many other lines he represented at that time?

A. I think only two. He had two small tool lines related to what we have.

Mr. Wall: You may cross-examine.

(Testimony of Robert W. Kerr.)

Cross-Examination

By Mr. Kenny:

Q. Mr. Schrenker had two small tool lines that were related to what Plomb Tool had, was that correct?

A. That is my recollection; yes, sir.

Q. During all of the time that Mr. Sanger was with Plomb he did not have any tool lines that were related to the Plomb Tool, isn't that correct?

A. Well, I couldn't speak for all of his period of [124] service, Mr. Kenny. The period that I am familiar with I don't believe he had any other tool lines.

Q. You stated there were various reasons that Mr. Schrenker was not subject to a change in status. One of them was he had not gone to war, wasn't that right? He had been in this country and in the service of Plomb Tool all through the years 1943, '44, and '45, isn't that correct?

A. Well, I think the answer to that, Mr. Kenny, would be that he had served during the previous war. He had a son in this war and he was not——

The Court: It was just a question of whether he was in the service or not.

A. He was not in the service in the second war; that is correct.

Q. (By Mr. Kenny): You did not reduce his commission to seven and one-half per cent, did you?

A. Oh, yes. I am quite certain that was on the same basis as all the rest of them.

(Testimony of Robert W. Kerr.)

Q. At the same time status? A. Right.

Q. Do you remember having a conversation in August of 1946 with a Mr. B. H. Koenig, who is a man from the Veterans Administration?

A. Well, I had conversation with Mr. Koenig, yes. I don't recall the exact date. [125]

Mr. Kenny: This, for the record, is Plaintiff's Exhibit 35.

Q. I am going to read to you a report that was made of that conversation by Mr. Koenig and ask you if that is substantially correct, or what changes you would like to make in what Mr. Koenig's report of that conversation was. He said that:

"Called at the plant of the Plomb Tool Company, Los Angeles Office and had a conference with Mr. R. W. Kerr, vice-president of the company. He stated the position of the company to be that the veteran was not an employee and had no reemployment rights; that he was a manufacturers' agent working on his own and carrying five other lines; that his activities were free from their direction and control; that the territory that the veteran had had was roughly Kansas, Nebraska, Iowa, and Missouri."

And I interrupt at that point. Was that correct, that you told him it was Kansas, Nebraska, Iowa, and Missouri?

A. That is correct; that is the Kansas City territory.

(Testimony of Robert W. Kerr.)

Q. You do recall, do you not, that Mr. Sanger before he went to war also had Minnesota and South Dakota?

A. He had a part of them, Mr. Kenny, yes; and it was a relatively minor part as far as business volume was concerned. [126]

Q. Yes. To go on reading this report of Mr. Koenig's:

"Mr. Kerr stated that the veteran had made a personal contact at their plant in Los Angeles, and that they had offered to reemploy him on the conditions of their present policies and rules. When asked what these changes were they stated as follows:

"1. Men must work exclusively for Plomb Tool Company and handle no other line.

"2. Men must follow regular itineraries and make regular daily reports to them; that the commission rate had been cut from 12½% to 7½%, and that the veteran had refused this offer."

Would you say that was a correct report of the conversation?

A. Substantially correct. One thing on the commission rate is not entirely correct, because on the old basis there had been some items on a higher rate, but the average rate, as I recall, was 10 per cent across the board.

Q. Continuing:

"Brought up the Shrinker case."

(Testimony of Robert W. Kerr.)

The gentleman calls it "Shrinker" in this report. The S-h-r-i-n-k-e-r case.

"They stated that Shrinker was permitted to continue on the old basis at his request, but that at the end of his present contract, which will coincide with the end of this year, he will be required to comply with the present [127] policies and rules, or he will not be allowed to handle the line."

Is that correct?

A. I would say substantially correct. I don't recall whether it was said in that many words or the same words or not.

Q. And the final paragraph is:

"The reason primarily for the change in policy is to make the field representatives direct employees of the company and to intensify the selling campaign throughout the country by thus compelling more frequent and regular calls."

That is correct, isn't it?

A. That is correct.

Q. Mr. Koenig stated that Schrenker was to be permitted to continue carrying his other lines until the end of this year. That would be the end of 1946, is that correct?

A. He has been so notified; that is correct.

Q. Counsel for defendant has showed you Exhibit No. 31, and I will ask you if this language is not contained therein?

(Testimony of Robert W. Kerr.)

“My loyalty will not allow me to leave the other firms that I represent, at this time, to go with Plomb exclusively. I am going to give them representation at least until the first of the year.”

And that would be up to the end of 1946, wouldn't it?

A. Yes. [128]

Q. I will read you the rest of the letter.

“I realize that this letter was to be a proposition on my part to sell you, so that I could again work for Plomb, so it appears that I will just have to stand on my record with the Plomb Tool Company. I am enclosing a compilation of commissions paid to me during the years I worked for the company and I believe that they do speak for themselves. The first figure 82 cents covers commissions paid to me for the months of July through December, 1932. I wish to recall to your attention that I opened every account in the territory with the exception of Osiek at St. Charles, Mo., which I am sure will prove to be just another small account, now that the war is over.”

Would you say that was correct, Mr. Sanger's statement that he opened every account in the Kansas City territory?

A. I would say substantially correct. Not all of them, Mr. Kenny, but a majority of them, yes.

The Court: Do you understand from that letter

(Testimony of Robert W. Kerr.)

that Mr. Sanger was proposing to you that he would give up the other lines at the end of 1946?

The Witness: That is correct, but then later he said he was not willing to do that.

Q. (By Mr. Kenny): Not willing to give them up at the end of the year? [129]

A. That was at the time that he met with Mr. Pendleton and me at the end of the year, December.

Q. Where did that meeting take place?

A. Atlantic City.

Q. I know, but whereabouts?

A. At the Claridge Hotel.

Q. What room? A. In the lounge.

Q. In the bar, I take it? A. Right.

Q. Yes. You had some drinks together?

A. That is right.

Q. That was after Mr. Sanger had gone to selective service and after Mr. Koenig had been to see you? A. That is right.

The Court: Had you ever told Mr. Sanger that the position of the company was that he was not an employee and had no reemployment rights as a veteran?

The Witness: I believe so, your Honor. That has been discussed with our personnel director at the time the matter first came up, because it was something that was dropped into my hands without previous connection, and the advice that I received then was that he had not been an employee, therefore, was not entitled to those rights.

Q. (By Mr. Kenny): Now, this Chicago terri-

(Testimony of Robert W. Kerr.)

tory that you [130] and Mr. Sanger had discussions with, that was a real weak spot in the Plomb group, wasn't it?

A. In relation to the potential of the territory it was. And we had a fairly substantial amount of business there, but not what I thought we should have had.

Q. Didn't you tell Mr. Sanger that if he went up there he could make a name for himself?

A. I don't think I told him "make a name for himself." I think I told him he could make himself a lot of money.

Q. Didn't you say that he could enhance his reputation as a salesman by going up there into the Chicago territory?

A. Oh, I don't recall making any such statement as that. I already had a great deal of regard for him as a salesman.

Q. In your discussion about the Chicago territory in which you said that he could continue to carry his other lines did you have any discussion of how he was going to be able to carry his other lines which were down in the Kansas City territory and engage in this venture for Plomb up in the Chicago territory?

A. Well, yes.

Q. Did you have any discussion about that?

A. Yes, we had discussions of that and Mr. Sanger pointed out that he had—he planned to add additional men to his crew. He referred to men who had worked for him before [131] he went into the service. As I recall, one or two of them had gone

(Testimony of Robert W. Kerr.)

into the service about the same time or subsequently. He expected to rehire them, and there was considerable discussion as to how it would be covered. My understanding was that he felt he could use those other men to cover the Kansas City territory on his other lines.

Q. He did not accept your offer to go to Chicago, did he? A. No, he did not.

Q. And one of the reasons he did not accept it was, was it not, that it presented, if not an impossibility, at least unfeasibility of continuing his other lines in his old territory and working on your lines in the Chicago territory; isn't that correct?

A. That was the final decision; that is right.

Q. I am going to ask you, Mr. Kerr, a general question about selling in this automotive field. Actually, a man who is selling tools and, say, water pumps and gears and brake lining or whatever other automotive parts, it is just as easy, is it not, for him to sell the tools along with the other lines that he presents to the various jobbers as he goes about the territory; isn't that correct?

A. You mean at the same time?

Q. Yes.

A. In my judgment, no. As a matter of fact, I believe [132] quite the contrary. From experience, I have found that it does not work out satisfactorily. A tool line, most of them, because it happens to be more of a detail line with the average jobber than his other lines, does require more actual merchandising activity on the part of the manufac-

(Testimony of Robert W. Kerr.)

turer and his representatives. The whole industry trend has been that way.

Q. What about in your present company, what is your policy?

A. Our present company, we have both manufacturers' agents and direct representatives, but again——

Q. As a matter of fact you had Mr. Sanger handling some of your tools for a while?

A. That is correct.

Q. Along with his other lines?

A. But it has not proved satisfactory and we have replaced all but three of the manufacturers' representatives now with our own direct men.

Q. When a company is small, I think you testified, at least when the Plomb Company was small they used salesmen handling multiple lines, that is correct?

A. That is correct.

Q. And then during the war Plomb had a terrific growth; isn't that correct, too?

A. That is correct. [133]

Q. By "terrific" can you just tell us what Plomb sold? I think in one year 14,000,000 in tools, isn't that correct?

A. That is right; in excess of 14,000,000.

Q. As against what in the years before the war?

A. Approximately a million.

Q. From a million to 14,000,000?

A. That is correct.

Q. All right. I will not withdraw the word "terrific" then. And it was during that period of

(Testimony of Robert W. Kerr.)

growth during the war that this policy of change to direct selling was adopted by Plomb Tool Company, isn't that correct, with the exception of Mr. Schrenker?

A. Well, that policy was commenced, Mr. Kenny, prior to the war. It was not a war-born policy. It was one that was established before the war started. And as a matter of fact, to correct the one answer I made there, the \$14,000,000 year was not during the war; that was 1947.

Q. That was after the war?

A. That was after the war; that is correct.

Q. But that policy adopted in 1941 was never applied to Mr. Sanger while he was still working for the company before he went to war, was it?

A. Well, no, because that was put into effect in January of 1942, and Mr. Sanger had either already gone into [134] the service or had given notice that he was going to.

Q. I think the record will show that Mr. Sanger did not go into the service until the end of 1942, isn't that correct?

A. My recollection was—I am not certain of that, Mr. Kenny. I was not in the picture at that time.

Q. I realize. You were the salesmanager until '44, were you?

A. That is right.

The Court: November, 1942, is the stipulation, is it not?

Mr. Kenny: That is correct.

Q. You stated that when Mr. Sanger during

(Testimony of Robert W. Kerr.)

these discussions wanted extended time, an extension of time to get rid of his other lines if he was to work in the Kansas City territory, that Plomb was unwilling to give him any extended time, is that correct?

A. Beyond what would be normal, reasonable notice, as I said earlier, yes.

Q. Which would be what?

A. Usually 30 days.

Q. Yes. The Kansas City territory that you discussed giving him, what did that exclude from the territory that he had before he went to war?

A. Well, in geographical area it excluded a part of the Dakotas and Minnesota.

Q. In dollar volume or percentagewise in dollar [135] volume what would that exclude from his territory?

A. Well, at the time he went into the service, that area, that part of it was relatively small. I could not give you exact percentage without seeing the figures, but we subsequently put in much heavier coverage there and built that territory up.

Q. Didn't Mr. Sanger bring in the Iron Stores account up there in Minnesota?

A. He brought in one of them, as I recall, the Cave Supply Co.

Q. And that was the first of those Iron Stores accounts that you got, wasn't it?

A. That is correct.

Q. And didn't he bring in some of the Northern Pump business up there?

(Testimony of Robert W. Kerr.)

A. I don't know, Mr. Kenny. That was prior to my time.

Q. But you did have the Northern Pump as an account, and a big one, wasn't it?

A. No, I don't recall the Northern Pump.

Q. You do recall the Iron Stores, and that was a big account ultimately, wasn't it?

A. Well, there is a peculiar circumstance in connection with that one that makes me recall it.

Q. It was a big one?

A. It became a big one, yes. [136]

Q. And Minnesota and North Dakota were not offered to Mr. Sanger in this offer of the Kansas City territory?

A. No, they were not.

Q. Did you ever arrive at anything definite with Mr. Sanger as to under what terms and conditions he was to carry Mr. Freund and these other two gentlemen who had gotten on the company's payroll during the war?

A. No. As a matter of fact the understanding was that if he took over the Kansas City territory, Mr. Freund at least, the senior man in the territory, would be moved elsewhere.

Q. Now, Mr. Sanger got out here on the first of January, didn't he, in your first conversations?

A. I am not sure, Mr. Kenny. I think he came earlier than that, as I recall. I think he came sometime in December for the holidays.

Q. You told him at the conclusion of the discussions that you had personally with him that you were sending for Mr. Freund and that you would

(Testimony of Robert W. Kerr.)

let him know the results of your discussions with Mr. Freund, and for him to call you about every day to find out what the results were; do you remember that?

A. No, no. As a matter of fact I never told him I was sending for Mr. Freund, because I didn't. Mr. Freund's arrival was a surprise to me at the time. [137]

Q. Did you ever tell him that you would tell him the results of your conversations with Mr. Freund? A. I may have.

Q. Did you ever invite him to come down and talk it over with Mr. Freund?

A. Not to my recollection, Mr. Kenny. We were talking some about it almost every day on the telephone or else——

Q. By "we"—— A. Mr. Sanger and I.

Q. Wasn't there about a two weeks' period when you did not see Mr. Sanger personally but merely talked to him over the phone or heard that he was inquiring for you over the phone?

A. No, I don't think there was any two weeks' period. There may have been a matter of a few days in there, but, as I recall, he was only there between two and three weeks altogether.

Q. But how many days during those two or three weeks was he out at the Plomb plant that you saw him on?

A. Several times. I don't know the exact number.

Q. Well, would you say two times, twice?

(Testimony of Robert W. Kerr.)

A. No, I would say more than that. I would say probably a half a dozen times anyway.

Q. Did he have six different interviews with you, six times with you? [138]

A. I would say at least that.

Q. And after Mr. Freund came out, did he have any personal interviews with you or any personal interviews with Mr. Pendleton at which you were present?

Mr. Wall: After Mr. Freund left?

Mr. Kenny: No, after Mr. Freund came out. I am trying to find out what happened after Mr. Freund came out here. Then did you do any talking in Los Angeles with Mr. Sanger?

A. Oh, yes. Yes.

Q. Were those personal conversations or were they over the telephone?

A. I think both, Mr. Kenny. I am not certain.

Q. Can you fix in your mind and tell the court any specific conversation you had with Mr. Sanger after Mr. Freund arrived out here?

A. Well, I don't recall specific conversations. As I have said earlier, we were talking. Mr. Sanger was in and out of Los Angeles. He was making trips around the area, and when he was in town he would call me and we would discuss the same matter again as we had been going around on it.

Q. Didn't you tell him that you were awaiting a decision from Mr. Pendleton during all that time?

A. No, because Mr. Pendleton was in on the discussions as we went along.

(Testimony of Robert W. Kerr.)

Q. Exhibit 29, which you have already been shown, Mr. [139] Sanger wrote to you on the 27th of January after he got back to Kansas City, and he said:

“Haven’t had time to think of any propositions to make to you, but am looking forward to hearing from you, so that I can again represent the Plomb Tool Company. Haven’t had time to think of any propositions to make to you.”

Does that refresh your recollection as to under what circumstances you and Mr. Sanger broke off your discussions in Los Angeles before he went to Kansas City?

A. Yes, that part of it I recall fairly well, because Mr. Sanger stated then that he did not feel that he was ready to agree to either of the propositions that had been made previously, but that he would like some time to think it over and subsequently might come back to me with a proposition. That was the way it was left.

The Court: We will take the morning recess at this time, five minutes.

(Short recess.)

Mr. Kenny: I have no further questions.

The Court: Mr. Kerr, at the time you made these offers to Mr. Sanger here in Los Angeles in the early part of 1946, at that time had you said anything to him about the attitude of the company with respect to his rights as a veteran, as to whether

(Testimony of Robert W. Kerr.)

he had any rights under the Act to be [140] reemployed?

The Witness: Yes. I believe, your Honor, that that was discussed at that first meeting in December in Chicago, when I told him at that time that the position of the company would have to be that.

The Court: In other words, to get to the point of it—and counsel may object, if they desire, to the form of this question—what I am trying to get at is this: These offers you made him, were they offers of reemployment under the Selective Service Act or were they just business deals you expected to make, standing on the position, the company's position, that Sanger had no rights under the Act?

The Witness: The position we took, your Honor, was that we did not believe that he had any rights under the GI Bill. However, we had a great deal of regard and respect for him, and had we been able to work out some arrangement, would have been glad to have him back in the organization.

The Court: In other words, you made him these offers because you wanted him back, not because you thought he had any legal right to be employed, is that correct?

The Witness: That is correct.

The Court: Did you so state to him in substance and effect?

The Witness: That is correct.

The Court: The stipulation filed here states that the geographical limits of the territory in which Mr. Sanger [141] formerly worked have been re-

(Testimony of Robert W. Kerr.)

duced from time to time until it now comprises the States of Kansas and Missouri, and that portion of Nebraska east of the extension of the Colorado eastern border, certain counties in Illinois, and all of the Iowa except certain counties therein. Are you familiar with that territory?

The Witness: Yes. Yes, I am.

The Court: Would you say that was a territory comparable to the territory that Mr. Sanger worked prior to the war?

The Witness: From the standpoint of the distribution that had been developed, yes. As I said earlier, your Honor, the Minnesota and Dakota territories had been relatively unexplored areas so far as Plomb was concerned up to the time of the war.

The Court: Was that the territory you offered him in January of 1946?

The Witness: In January, '46, it was the then existing Kansas City territory, which is approximately what that stipulation says, although at that time I do not believe those Illinois counties were in it.

The Court: Were portions of Iowa in it?

The Witness: At that time it included all of Iowa, all of Nebraska except that small tip up in the northwest section, and all of Missouri and Kansas.

The Court: Any redirect? [142]

Mr. Kenny: Just on that.

Q. But that Kansas territory that was the subject of your discussions had tied to it the condition

(Testimony of Robert W. Kerr.)

that he take along with him Mr. Freund and the other two men who had been accumulated on the payroll? A. Not Mr. Freund.

Q. Not Mr. Freund, but at least take on three men? A. That is correct.

Q. And he was to take them on, and the commission was now $7\frac{1}{2}$ per cent?

A. That is correct.

Q. As against 10 or $12\frac{1}{2}$?

A. That is correct.

Q. I think the contract was $12\frac{1}{2}$ mostly at the time Mr. Sanger had it?

A. At his time it may have been.

Q. So he was to get slightly reduced territory, that is, with Minnesota and South Dakota cut off, and he was to get three men added to him and less commission; that was the offer, is that correct?

A. Well, a lesser rate of commission.

Q. Yes, the volume may have taken care of it?

A. The thing that was explained to him at the time was that the company's production and merchandising program made that even much more lucrative than the arrangement pre-war. [143]

The Court: Did you discuss with him who was to pay these men?

The Witness: Well, in explaining the new program I undoubtedly explained how it was worked, which was done in all territories, your Honor, and that was, the earnings were pooled, then a division was made according to agreement between the district manager and the men and the company.

(Testimony of Robert W. Kerr.)

The Court: In other words, the territory yielded certain business.

The Witness: That is correct.

The Court: And certain commissions followed from that business?

The Witness: That is correct.

The Court: And that would be divided as gross earnings among the men who worked the territory, is that it?

The Witness: That is correct.

Q. (By Mr. Kenny): Do you recall Mr. Sanger having written to you in May of 1945 and you replying to him on July 20, 1945? I show you Exhibit 28. A. Yes, I recall that letter now.

Mr. Wall: Which exhibit is that, Mr. Kenny?

Mr. Kenny: Exhibit 28. It was item 61.

Q. Mr. Sanger wrote May 15th; that was about six months before he got out of the service, isn't that correct? A. That is right. [144]

Q. So when you wrote him you did not tell him that you were standing on the position that the GI Bill of Rights or the Selective Service Act did not apply to him; you did not write him that, did you?

A. No. I had no occasion to, Mr. Kenny.

Q. What you did, you told him you were going to have difficulty hiring because of the changed plan, isn't that right?

A. That is what it says there; yes.

Q. And that was your original position, that you

(Testimony of Robert W. Kerr.)

had difficulties; you had changed your methods while he was at war, isn't that correct?

A. That is correct.

Mr. Kenny: That is all.

The Court: Mr. Kerr, did you talk with Mr. Sanger about how the earnings of this territory would be divided between him and the other men?

The Witness: Well, again, we went into the details of the territory at considerable length, and I am certain that that was one of the matters that was discussed, because it was quite important to him at the time.

The Court: Was there a fixed policy as to division—the chief man or head men or district manager would get so much?

The Witness: Again, that depended on the production [145] from the territory and the number of men involved. In other words, where there were two men, the usual arrangement was a 60-40 basis; where there were three men it was usually 40-30 and 30; and then where there were more men it would be scaled down still further.

The Court: Do you recall what arrangements——

The Witness: My recollection of that territory was 40-30 and 30.

The Court: Is that your recollection of what you told Mr. Sanger?

The Witness: That is correct.

The Court: Do you have redirect?

Mr. Wall: Yes, if I may, your Honor.

(Testimony of Robert W. Kerr.)

Redirect Examination

By Mr. Wall:

Q. Mr. Kerr, as I understood you on your direct examination, you said that in 1946 the Kansas City territory was served by Mr. Freund and two additional men? A. That is correct.

Q. In Mr. Kenny's questions I was not sure whether he was talking about a three-man total or Freund plus two. Am I correct that you said that that territory then had Freund plus two men?

A. That is right.

Q. And, as I understood your direct testimony, you said [146] that your condition with respect to manpower attached to your offer to Mr. Sanger was that he put equal manpower to that which Freund had, was it; or was it not a condition of that offer that he take these two men whom Freund then had, or was Mr. Sanger to be entitled to have some voice in choosing his own assistants?

A. As I recall, that was left open. That was the one point on which I was firm, was that he would have to have the same manpower coverage as then existed, at least that.

Q. Now, you gave some testimony with reference to accounts opened in this territory by Mr. Sanger. After Mr. Sanger went into the service were there any new accounts in his former territory which were opened by Mr. Freund or other people who were assigned to that territory after Mr. Sanger left?

(Testimony of Robert W. Kerr.)

A. Well, as I recall, there were other accounts. There were some that had been dormant with him that were revived and made very active, and without having the list of accounts in front of me I would not say specifically what other ones were added, but with the increase in the activity of the territory, I am quite certain there were other accounts added.

The Court: When the volume increased from one to fourteen million, Kansas City territory contributed its share, did it?

The Witness: In fact more than its proportionate share; that is correct. [147]

Q. (By Mr. Wall): Do you happen to recall, Mr. Kerr, how much of an increase there was in that business in that territory from, say, 1942 to 1946? I recognize that you have been away from the company a while. I don't know whether you would recall it.

A. My recollection, offhand, was that it ran from eight to ten times greater than it had before. Of course, the \$14,000,000 figure is a little misleading, Mr. Wall, in that in the period intervening Plomb Tool Company had acquired four subsidiary companies and the volume that went in Plomb tools through these wholesalers was only a part of that total of 14,000,000. One company made tools, for example, for the syndicates like Sears Roebuck and those companies; another one was making tools for Government agencies. And again there was the additions of the plier and ad-

(Testimony of Robert W. Kerr.)

justable pipe wrench plant in New York State which added to the total volume.

Q. Are the subsidiaries P & C Hand Forged Tool Co. and——

A. P & C Hand Forged Tool Co., Penens Corporation, and the J. P. Danielson Company, New York.

Q. The J. P. Danielson Company, I believe, was eventually made a part of or merged into the Plomb Tool Company, wasn't it?

A. That is right. [148]

Q. Did your offer to Mr. Sanger in 1946 contemplate that he would be entitled to represent the lines of these subsidiary companies?

A. At that time we had in connection with the new program, the expanded activity, we had given the Plomb men sale of the P & C line. Of course, they had added to their business the Danielson products, which became a part of both the Plomb and P & C lines. The Penens line was not included at that time.

Q. Did your offer to Mr. Sanger include representation of the P & C line?

A. Yes, that is correct.

Mr. Wall: That is all.

Recross-Examination

By Mr. Kenny:

Q. The P & C line. Who made the line of products called "Challenger"?

(Testimony of Robert W. Kerr.)

A. Challenger was made by Penens Corporation.

Q. Penens? A. That is correct.

Q. And before the war Mr. Sanger was selling Challenger products, wasn't he?

A. Oh, no. We didn't have—well, we made for a short while, I think it was in 1939, a few tools in the Plomb line which were called "Challenger tools," but what is [149] presently known as the Challenger line was not developed until the summer of 1946 and is made by the Penens Corporation which is a subsidiary.

Q. And the J. P. Danielson merger did not occur until very late in 1946 or 1947; they did not come into the picture until after you got through dealing with Mr. Sanger, did they?

A. That is correct.

Mr. Kenny: That is all.

Mr. Wall: No further questions.

The Court: You may step down, Mr. Kerr.
Your next witness.

Mr. Wall: I will call Mr. Pendleton.

MORRIS B. PENDLETON

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Morris B. Pendleton.

Direct Examination

By Mr. Wall:

Q. You are the president of Plomb Tool Company, are you, Mr. Pendleton?

A. Yes, sir.

Q. How long have you held that office?

A. Since October of 1936.

Q. Were you connected with the company prior to that [150] time?

A. Yes. I was vice-president from 1928 until I became president.

Q. Are you familiar, Mr. Pendleton, with the status of the sales representatives of the company in the period of 1941 and prior thereto?

A. Yes, sir.

Q. Will you state what the company's policy was with respect to sales representation during that period?

Mr. Kenny: Can I have the date?

Mr. Wall: 1941 and prior thereto.

Mr. Kenny: That would be January 1st, 1941?

Mr. Wall: I am speaking of the period prior to January 1st, 1942, during 1941 and prior thereto.

A. During 1941 and prior thereto the sales of the company, Plomb Tool Company, was generally

(Testimony of Morris B. Pendleton.)

handled by manufacturers' representatives or known as manufacturers' agents.

Q. Did all of those manufacturers' representatives handle other lines in addition to the Plomb line?

A. Some handled other lines made by other companies; some represented the Plomb Tool Company exclusively.

Q. Did you have so-called missionary men doing the work in connection with your sales activities at that time?

A. Yes. In 1941 and prior we had certain missionary men who were employees of the Plomb Tool Company and who [151] worked in various parts of the country under the joint direction of the company and the representative of the company in the specific territory.

Q. What type of activities did they engage in?

A. As the term "missionary men" implies in the trade, their job was pretty much in the matter of arranging stocks or making display boards clean and neat and orderly, in the distribution of catalogs, and frequently in calling on garages to solicit business on behalf of jobber customers that we might have had on our books or were at that time soliciting.

Q. Did those missionary men solicit direct orders for Plomb Tool Company?

A. They might go into a jobber's, in the absence of a territorial representative—manufacturers' agent in those days—and actually receive an order

(Testimony of Morris B. Pendleton.)

written by the jobber and forward it to the company, because the commissions were paid on a territorial basis and not on the basis of orders as written or on the basis of who might have picked up the order.

Q. There was reference yesterday in Mr. Sanger's testimony to a Mr. Nate Needham, whom I believe he said was assigned to his territory. Can you state what capacity Mr. Needham held with the company?

A. Mr. Needham was originally a peddler, meaning a person who bought tools from us and resold to garages. And then he was in that capacity about the time Mr. Sanger came [152] into the territory, and then later became a missionary man, giving up his former business, and as a missionary man became an employee of the company. He was finally terminated in 1938, I believe, possibly 1939.

Q. When you say he was terminated you mean he left the company's employ?

A. He terminated in the employ of the company.

Q. I believe the evidence showed yesterday, Mr. Pendleton, that Mr. Sanger made his first connection with the Plomb Tool Company in 1932 as a manufacturers' representative; and I believe Mr. Sanger testified that a Mr. Moore helped him at that time to arrange for other lines to handle. Who was Mr. Moore?

A. Mr. Moore, in 1932, was the then salesman-

(Testimony of Morris B. Pendleton.)

ager of the Plomb Tool Company and, as the testimony indicated yesterday, worked out an arrangement with Mr. Sanger in collaboration with other manufacturers, and Mr. Sanger went into the so-called Kansas City territory with a number of lines, of which Wohlerdt was mentioned here, and Plomb Tool Company lines, and functioned for the various manufacturers as a manufacturers' agent in that area.

Q. Is that a typical situation for Mr. Moore to help Mr. Sanger to get other lines to represent?

A. When companies are small and their customers are limited and their sales volume is small, it is very common in [153] the tool business of various sorts for sales to come through manufacturers' agents; and, as a matter of neighborliness, if several companies have a territory in which they want representation, for them to jointly use the same person to represent them.

Q. During this period prior to January of 1942, when you have testified that the sales representatives were all manufacturers' representatives rather than employees of the company, did the fact that by treating them as independent contractors rather than employees would eliminate the necessity for making social security payments with respect to those men have any bearing upon the policy of the company in so treating them?

Mr. Kenny: Well, I submit that is calling for a conclusion of the witness as to whether the social

(Testimony of Morris B. Pendleton.)

security law in 1936 would have any effect on the policy. I object to it on that ground.

The Court: The question, as I understand it, is whether the change was prompted by a desire to avoid the necessary impact of the law, the Social Security Act.

Mr. Wall: A statement was made——

Mr. Kenny: I think it is a practical question, anyway. I will withdraw the objection.

The Court: Is that your intent, to ask whether the change was prompted—— [154]

Mr. Wall: I was not asking about a change, your Honor. The implication of Mr. Sanger's testimony yesterday was that the reason he and other men were on an independent contractor form of contract prior to his going into the army was because of social security savings involved.

The Court: Yes, I have in mind that corollary issue that has been injected here. But your question is, precisely, whether the change in the contract was prompted by a desire to avoid the impact of the Social Security Act?

Mr. Wall: It is not directed at the change in the contract, your Honor. I am asking as to whether the policy of treating them as independent contractors prior to 1942 was the result of the desire to save social security taxes.

The Court: Very well, he may answer.

Q. No. The economy in the matter of social security taxes, both Federal and State, was an im-

(Testimony of Morris B. Pendleton.)

material consideration in this matter. The desire to change from an independent contractual basis to full employees was motivated by the need on the part of the company to have full-time employees under its direction and control, so that we could get the maximum sales volume out of the several territories.

The Court: Prior to 1939 was this plaintiff here, Mr. Sanger, an employee of the company?

The Witness: Prior to 1939?

The Court: Yes. [155]

The Witness: Mr. Sanger, prior to 1939, Mr. Sanger was a manufacturers' agent.

The Court: Had he been prior to the time he went into the service at any time an employee of the company?

The Witness: No. In our opinion Mr. Sanger was never an employee of the company at any time, and served as manufacturers' representative and manufacturers' agent at all times.

The Court: There was no change in the arrangement, so far as you know, from the time he first came into the company until he went into the service?

The Witness: No. Our relationship with him has been consistently throughout the years the relationship of manufacturer with that of an independent contractor or a manufacturers' agent.

The Court: Yes, I understand. I direct the question: Had there been any change? And I understand the answer is "No."

(Testimony of Morris B. Pendleton.)

Q. (By Mr. Wall): I show you, Mr. Pendleton, Plaintiff's Exhibit 7, which is a memorandum of agreement between the Plomb Tool Company, "called the Company, and L. H. Sanger, called the Salesman," which I believe Mr. Sanger testified he executed to cover the year 1938. I also show you Plaintiff's Exhibit 8, which is a Memorandum of Agreement dated January 31, 1939, in which Mr. Sanger is referred to [156] as the Representative to sell its products "as an independent contractor" and I ask you whether or not the change in the form of the contract from 1938 to 1939 as between those two exhibits was in any way influenced by a desire on the part of the company to avoid the payment of social security taxes?

A. No, sir. The use of "salesman" in one case and "representative" in the other case is purely a choice of words, and did not in any way alter the relationship between the company and Mr. Sanger.

The Court: Do you know why the change was made?

The Witness: No, I do not. In one case, one person, Mr. Moore, drafted it, and I think in the other case, Mr. Stevens. I am not sure. It was purely a choice of synonyms for the same relationship, that of a manufacturers' agent.

Q. (By Mr. Wall): Now, Mr. Pendleton, there has been reference here to the fact that after the war or by 1946 the company policy had changed and it had gone over to employing salesmen as

(Testimony of Morris B. Pendleton.)

employees on a full-time basis. Are you familiar with that change in policy? A. Yes, sir.

Mr. Kenny: I hate to accuse counsel of misstating evidence, but this witness has testified that the change of policy occurred on January 1st, 1942, or prior thereto, and not 1946.

Mr. Wall: That is right. I understand that. My statement [157] was, Mr. Kenny, that by 1946 that change had been made.

The Court: Do you wish to restate your question?

The Witness: Please.

Mr. Wall: I will restate the question.

Q. When did the company change its policy, Mr. Pendleton, and determine to handle its selling activities through employee-salesmen employed on a full-time basis?

A. The decisions were reached to change from an independent contractual relationship to an employee relationship in the fall of 1941, as between Mr. Stevens, vice-president in charge of sales, and myself, to be effective on January 1, 1942.

Q. Will you please state the circumstances which led up to that change in policy?

A. The circumstances leading to that change in policy was the result of the normal evolution and growth of our company, the increase in the number of its employees, the increase in the variety of tools that we were manufacturing, the increase in the number of industries that we were serving and the tools that we were making for them; and also

(Testimony of Morris B. Pendleton.)

because many customers had suggested that they could be far better served by full-time exclusive men than they could be served by manufacturers' agents with multiple lines. And further buttressing our judgment, we examined the affairs of a great many growth companies and found the determination was [158] generally consistent that those companies in their early days started with such commission representation on an agency basis as they could obtain, and then as they grew, they had other full-time men, either former agents discontinue other lines and work solely for the company in question, or the replacement of those agents by full-time employees.

Q. Had there been an increase in the company's business of any substantial character by the fall of 1941, when you say this decision was reached?

A. If I may refer to some notes that I made this morning? From our records—and this is the Plomb Company not including subsidiaries—in 1939 the sales volume was \$869,000; in 1940, \$1,154,000; and in 1941, \$2,414,000, or a three-fold increase from 1939 to and including 1941. But the significant fact there is that while we increased three times in sales volume, measured by dollars, our per cent to the Service Hand Tool Industry had increased from 3.5 per cent in 1939 to 5.4 per cent in 1941.

Q. Those figures that you have given, Mr. Pendleton, with respect to the dollar volume of the

(Testimony of Morris B. Pendleton.)

Plomb Tool Company's sales are derived from the company's books?

A. They are derived from the company's books, and the industry figures are derived from the Service Tool Institute which keeps figures on the hand tool industry.

Q. Did that increase in the company's business continue on until 1946, Mr. Pendleton? [159]

A. Yes, sir. In 1942 the Plomb Tool Company only, without subsidiaries, sold \$4,719,000; 1943, \$5,887,000; 1944, \$7,197,000; 1945, \$6,852,000; and in 1946, \$10,600,000. And the corollary to that, which is even more significant, is that while in 1941 our per cent to the industry was 5.4 per cent, by 1946, as the result of the full impact of our policies of full-time employees, it had risen to 11.7 per cent, or more than double the position that we had in the industry in 1941.

Q. Do those dollar figures you have given for those years, Mr. Pendleton, during the war include Government contract business?

A. This includes Government business sold to jobbers and direct to Government.

Q. Are those figures likewise, though, limited to the Plomb Tool Company alone?

A. These are limited to Plomb Tool Company only and are prior to the acquisition of the Danielson plant.

Q. When did you put into effect this policy with respect to having salesmen on a full-time employee basis which you say was determined in 1941?

(Testimony of Morris B. Pendleton.)

A. This policy was instituted in January, 1942.

Q. Was it made effective as to all salesmen at that time?

A. It was made effective to all salesmen that were [160] then independent contractors, excepting three. One was Neil Jones, whom we asked that he either come full time or he would be replaced, and he was terminated in May of 1944.

The Court: What territory did he have?

The Witness: He was working in the Carolinas, which was an exceedingly difficult territory to cover, and where sales were limited. He was terminated in May of 1944. The same pressure was put upon Mr. Schrenker and the understanding there was that—the compromise effected there was that he give us practically 100 per cent of his time, which he did, divesting himself of his attention to other lines so that he could give us the type of individual representation that we required.

The third exception was Mr. Sanger, who was continued in 1942 as a manufacturers' agent.

Q. (By Mr. Wall): Are you able to state, Mr. Pendleton, whether or not the jobbing business in the Kansas City territory increased in the period, say, subsequent to the war over the business in that territory prior to the war under Mr. Sanger?

A. The business in the so-called Kansas City territory, as developed by Mr. Sanger in 1941, produced approximately \$102,000 in sales volume, and in the year of 1946 the presently constituted Kansas City territory——

(Testimony of Morris B. Pendleton.)

Q. You mean presently constituted, or the territory [161] as constituted in 1946?

A. I beg your pardon. The territory as constituted in 1946 produced volume of \$737,000, or seven times the sales volume of 1941.

Q. And the figures for 1946 relate to the Kansas City territory as it then existed, which did not include Minnesota and portions of South Dakota?

A. That is correct.

Q. Which Mr. Sanger had?

A. That is correct.

Q. When you effected changes in your relationship, your contractual relationships with the sales representatives in 1942, with the exceptions you have mentioned of Mr. Sanger, Mr. Schrenker, and Jones, did you then commence to pay social security taxes with respect to the men who became employee-salesmen?

A. Yes, obviously, because we exerted strict control over the men, required of them itineraries, required many things of them, and they were fully and completely under our control; and obviously, in that respect, social security and unemployment insurance taxes followed as a natural consequence.

Q. Does Plomb Tool Company have a profit-sharing plan for its employees?

A. Yes, it does.

Q. Can you state in general what the nature of that plan [162] is?

A. The profit-sharing plan of Plomb Tool Company commenced in 1942 for those employees who

(Testimony of Morris B. Pendleton.)

were on our payroll as employees for the calendar year of 1942. The plan provides—the plan is evidenced by a trust indenture which is cleared, has been cleared through Internal Revenue, salary stabilization, wages and hours, California Corporation Commissioner, I think of at least, and the requirements of that plan are very strict and exacting. When the company makes a minimum profit, then the youngest employee would get one per cent for their first year of participation; for five years of participation would get two per cent. At the maximum rate of profit—not the maximum rate, but the minimum of maximum qualifying rate, the younger employees would begin with $7\frac{1}{2}$ per cent and the older employees will be credited 15 per cent of their compensation as employees for the year in question.

The Court: We will take the noon recess at this time.

Mr. Wall: Yes, your Honor.

The Court: Until 2:00 o'clock this afternoon.

Mr. Wall: Very well.

The Court: Very well, this trial is recessed, then, until 2:00 o'clock this afternoon.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day, Wednesday, December 20, 1950.) [163]

Wednesday, December 20, 1950, 2:00 o'Clock P.M.

(Other court proceedings.)

The Court: Are you ready to proceed in the case on trial?

Mr. Wall: Yes, sir. Mr. Pendleton, will you resume the stand, please?

MORRIS B. PENDLETON

Direct Examination

(Resumed)

By Mr. Wall:

Q. Just prior to the noon recess, Mr. Pendleton, I believe you were describing the profit-sharing plan that the company had in effect for its employees. I believe you said that that plan was put into effect first in the year 1942, is that correct?

A. Yes, sir.

Q. Was Mr. Sanger ever a participant?

A. No, sir.

Q. In the profit-sharing plan? A. No.

Q. This morning you gave some figures, Mr. Pendleton, regarding the gross sales of the defendant company for certain years, then a percentage of the industry for certain years, and also the gross sales volume of the Kansas City territory. I realized during the noon hour, and Mr. Kenny has also [164] called my attention to the fact, that we omitted the year 1942 from those figures, and while you are about it I wish you would direct yourself also to the years subsequent to 1946. Can you tell us the gross dollar sales volume of Plomb Tool Company for the year 1942?

(Testimony of Morris B. Pendleton.)

A. For the Plomb Tool Company not including subsidiaries for the calendar year of 1942 was \$4,-719,000, or 6.7 per cent of the industry.

Q. What are the same figures regarding Plomb Tool Company for 1947, 1948, and 1949?

A. 1947, \$9,750,000, 10.5 per cent of the industry; 1948, \$7,420,000, for a percentage of 9.3.

Mr. Wall: Just a moment, Mr. Pendleton. I had understood that Mr. Kenny wanted those figures. Maybe I am wrong.

Mr. Kenny: No, just the territory. Mr. Pendleton did not give us the territory figures for 1941 and 1946. We would like the territory figures for 1942 and 1949.

Q. (By Mr. Wall): Before you get to the territory figures, Mr. Pendleton, would you give the percentage of the industry figures for the Plomb Tool Company for the year 1942? We omitted that this morning.

A. The calendar year percentage of industry?

Q. Yes.

A. For the year 1942, the dollar figure was \$4,-719,000 and the per cent to the industry was 6.7 per cent. [165]

Q. Do you have the figures for the year 1942 on the Kansas City territory as then constituted, Mr. Sanger's territory at that time?

A. For 1942, the Kansas City territory as then constituted, had sales for the Plomb Tool Company of \$136,000.

Q. What were the territory figures for the Kan-

(Testimony of Morris B. Pendleton.)

sas City territory as constituted from time to time for 1947, 1948, and 1949?

A. For 1947, the Kansas City territory as then constituted for the Plomb Tool Company, was \$529,640; for 1948, \$623,000; 1949, \$295,500.

Mr. Wall: Are those the figures you wanted, Mr. Kenny?

Mr. Kenny: Yes. If there are any figures for 1950 available?

Mr. Wall: I do not know.

Q. Do you have figures for '50 on the territory?

A. No, sir.

Q. Mr. Pendleton, there has been testimony here to the effect that Mr. Sanger was awarded a service pin by the company for seven years' service, another for 10 years' service, I believe. Will you state what the policy of the company has been with respect to the award of service pins?

A. Service pins consist of a small metal badge about a quarter of an inch by three-eighths of an inch, of which I have a sample here, which reads: "Plomb Tool Co." and the [166] number of years services.

Q. And those are given in different metals for different years of service, I believe?

A. Those are given in brass for two, three, and four years; in silver for five to nine years, inclusive; and gold badges for 10 years and thereafter.

Q. What has been the policy of the company as to the persons to whom such pins were awarded?

(Testimony of Morris B. Pendleton.)

A. Those badges are given to persons irrespective of status, but on the basis of connection of service. They were given to manufacturers' agents, to employees, even to the directors of the company who were not employees.

Mr. Wall: Does your Honor care to see the pin? I do not think it is necessary to introduce it in evidence.

The Court: I have a general idea of it from the description and I visually see the physical aspects of it.

Mr. Wall: Thank you.

Q. You testified this morning, Mr. Pendleton, that prior to 1942 the company did employ certain missionary men to operate in the territories. Do you have any missionary men so employed at the present time?

A. No, we do not, for the reason that we have more manpower in the respective territories and those employees are expected to do their own missionary work and are doing so effectively, and which is a far better arrangement and more [167] effective than to have a missionary man supporting a territorial salesman of the type of a manufacturers' representative or agent.

Q. Now I would like to direct your attention to the month of January of 1946. Did you know at that time that Mr. Sanger applied to the company for reinstatement in his pre-war position?

A. Yes. He was here at the Los Angeles headquarters and, as is his custom, he has the run of the

(Testimony of Morris B. Pendleton.)

place and visits around with different people. We have known him since 1932 and he was with us for 11 years and built up various associations, and he was in and out of the different offices and I chatted with him.

Q. Did you have any conversation with Mr. Sanger in January of 1946 regarding his application for reinstatement?

A. Yes. I sat with Mr. Sanger and Mr. Kerr and listened to Mr. Kerr state the basis on which he offered Mr. Sanger a position with the company, and the offer seemed to be entirely reasonable and consistent with the way in which the company was operating at that time.

Q. Did you have any conversations with Mr. Sanger during that month of January at which Mr. Kerr was not present, regarding this subject?

A. No, only pleasantries, for the reason that we are well departmentalized in our company and certain officers [168] are responsible for different fields of activity, and Mr. Kerr's responsibility was very clearly that of sales, and since he had stated the basis on which he had offered Sanger another position, there would be no purpose in my discussing that privately with Mr. Sanger, because the basis on which it was so stated seemed to be adequate and clear and entirely satisfactory.

Q. When did you next see Mr. Sanger after the month of January, 1946?

A. I do not recall having seen Mr. Sanger from

(Testimony of Morris B. Pendleton.)

his January trip until he stopped in our booth at the A.S.I. show at Atlantic City in December.

Q. Was that December of 1946?

A. That was December of 1946.

Q. When you say "our booth," you mean at the Plomb Company?

A. At the Plomb Tool Company booth, and asked for an opportunity for conversation.

Q. What did you say when he asked for that opportunity?

A. My response was that I am always willing to talk with anybody at any time about company affairs, and that if he would meet Mr. Kerr and myself at the bar in the Claridge Hotel, we would be glad to visit with him.

Q. Did you and Mr. Kerr subsequently meet him in the [169] bar of the Claridge Hotel?

A. Yes, we did.

Q. That same day?

A. That same evening.

Q. Was there a discussion at that time of Mr. Sanger's desire to represent the Plomb Tool Company?

A. Yes. The position that I took was that an offer had been made in clear and unmistakable terms in January; and that I had understood from Mr. Kerr that it had been repeated on other occasions when I was not present; and my position at that time was that it was still open should he wish to accept even the Kansas City or the Chicago territory, as has been described here earlier in these

(Testimony of Morris B. Pendleton.)

hearings.

Q. Did Mr. Sanger make any response to that statement?

A. My memory was that he was still disinclined to accept either offer.

Mr. Wall: No further questions.

Cross-Examination

By Mr. Kenny:

Q. Mr. Pendleton, when did Mr. Sanger stop being a district manager for Plomb Tool?

A. At the end of 1942 upon entry into the service.

Q. And up until that time he was your district manager in Kansas City, is that correct?

A. We did not term him by that title "district manager." [170] That has been generally used in this court hearing. I did not refer to him as that, in that manner.

Q. You have never referred to him as "district manager"?

A. In our inter-company terminology he was the manufacturers' representative and a territory representative in my dealings with Mr. Sanger, in my correspondence with him.

Q. You never referred to him as an employee?

A. When he called upon us to make our best pitch in his behalf toward a Naval Officer enlistment, why we dressed our communications up in whatever language might be most impressive to the

(Testimony of Morris B. Pendleton.)

Naval Department and solely in Mr. Sanger's behalf.

Q. What you want to say is that you told your Government that he was your district manager, is that correct, Mr. Pendleton? You told your Government he was your district manager, didn't you?

A. Yes, sir.

Q. And that was not true, is that it?

A. Let me repeat what I said before, which you apparently did not understand, and that is, the nomenclature in the company in our internal operations is not necessarily consistent with a letter of recommendation, when you naturally go overboard in behalf of a man who asks you specifically to go overboard for him.

Q. Is this letter, which is Exhibit No. 22, the truth [171] or is it you going overboard in representing Mr. Sanger to your Government? And I call your attention to this language, Mr. Pendleton.

“In the many years he has been district manager for Plomb Tool Company, he has assisted in the designing of many special tools for various branches of Government and manufacturers serving these branches.”

Is that the truth or not?

A. Yes, it is the truth, and the fact that we use that language internally, in my opinion, is immaterial.

Q. It is the truth, then, that he was your district manager?

(Testimony of Morris B. Pendleton.)

A. He was our manufacturers' agent in that area and referred to in that letter as a district manager.

Q. But is that what you told the Government or is that the truth?

A. Well, the fact that we do not refer to him as the district manager internally does not alter the fact that he may be referred to in that instance in that manner.

Q. Is it the truth that he assisted you in designing special tools for various branches of the Government and manufacturers serving these branches?

A. All persons connected with the company in any capacity, whenever they came across an idea that would be useful in the way of a new tool or procedure or anything else, [172] irrespective of their status with the company, always were expected to turn in those ideas for the good of the company.

Q. Just what did Mr. Sanger do in that regard that supports this statement you made to the Government?

A. Mr. Sanger in his capacity as a manufacturers' agent representing us would give us the benefit of such ideas as would come to him from time to time, and entirely in line with duty, just the same as anybody else connected with the company would do the same thing.

Q. In the year 1946, you stated that Mr. Sanger's old territory yielded \$737,000. That was the highest yield that territory ever gave, wasn't it, 1946?

(Testimony of Morris B. Pendleton.)

A. I stated that \$737,000 was the volume of business in 1946 in the Kansas City territory as then constituted.

Q. And that was the highest you ever had in that territory, isn't that correct, 1946?

A. Yes, sir.

Q. 1946 was the year when you were selling tools to the Government GI schools that were being opened up, schools of training for veterans, wasn't that right? A. To some extent.

Q. Was not that, if not your biggest volume, your biggest new source of volume that occurred in that year, the selling of tools to the GI schools?

A. It was a new volume, but a relatively minor volume. [173]

Q. And didn't the rest of the volume of 1946 come from jobbers who were replenishing their stocks that had been depleted during the three preceding war years? A. To some extent.

Q. Doesn't that account—those two factors, among others—account for the fact that while your income in that territory was \$737,000 in 1946, it was only \$295,000 last year?

A. Yes, and for very specific reasons.

Q. And isn't it a fact that your revenue of your income from that area in 1950 is even going to be less than 1949?

A. No. 1950 will be materially higher than 1949.

Q. Relative to the policy on service pins, service buttons, was this—

(Testimony of Morris B. Pendleton.)

The Court: Are you referring to an Exhibit now?

Mr. Kenny: Yes, I am now referring to the exhibit attached to Exhibit 13.

Q. Was this for internal or external consumption, Mr. Pendleton, as you have described it hitherto, when you said:

“We wish it were possible for the members of the organization in the field force to be present. Obviously they cannot because of the nature and location of their work. They are very much a part of our group and are receiving their service buttons the same as those of us here. This welcome, by necessity, must go [174] to them by mail.”

A. Will you please state your question?

Q. What I am asking you, were the members of your field force treated as you say there, as much a part of the group as to receiving service buttons, as those who were there at this family day ceremony?

A. So far as the length of service connected with the organization they were. The service buttons were simply to define the number of years of service and were in no way any indication of the status of the employee in his relationship with the company.

Q. Are you the Morris B. Pendleton who presented service pins to Plomb Tool Company employees on that date?

A. Yes, sir; I am that person.

Q. And is Lionel Sanger who is listed under the

(Testimony of Morris B. Pendleton.)

heading "seven years," to the best of your knowledge, the plaintiff in this action?

A. Mr. Sanger is the plaintiff in this action, yes, sir; and who had seven years of connected service at that time.

Q. Do you know a man named Dave Gesick, referring to Exhibit 17?

A. Yes. Dave Gesick was an ordinary workman in the polishing or grinding department, I believe, and who at that time was elected by his fellow employees at the Los Angeles plant as the president of their employees' association. [175]

Q. On this exhibit there is a picture of a building and apparently two tennis courts. Can you identify that as any building on the Plomb premises?

A. That building was then erected on leased property, is a frame building without lining, about 30 feet by 60 feet, with a fireplace on one side and a counter at one end.

Q. Is it described as an employees' club house?

A. Yes, described as an employees' club house.

Mr. Kenny: That is all.

The Court: Any redirect?

Mr. Wall: If it please, your Honor.

Mr. Kenny: Oh, just one other important question which I did neglect.

Q. You stated, Mr. Pendleton, that the offer to Mr. Sanger had been made in clear and unmistakable terms; that is right, isn't it?

A. Yes, sir.

(Testimony of Morris B. Pendleton.)

Q. What was that offer, and clearly and unmistakably will you give us the terms of it now?

A. As I was with Mr. Sanger and Mr. Kerr in January of 1946, in Los Angeles, the offer was that he could have either the Kansas City territory as then constituted, and give up his other lines, and man it with the same amount of manpower that was in the territory at that time, or he could have the Chicago territory, which was an exceedingly good territory, [176] and if he chose, he could temporarily keep his other lines.

Q. What area was included in the Kansas City area under this offer?

A. Without referring to details and maps that I do not have with me, the Kansas City territory as then constituted was substantially the states of Missouri, Kansas, Nebraska, and Iowa, with a small portion of Nebraska against the Colorado line excepted therefrom, but for trading purposes it was those four states and, in addition, I believe the tip of Missouri across the river from St. Louis.

Q. The tip of Illinois?

A. I beg your pardon. The tip of Illinois across the river from St. Louis.

Q. What about South Dakota and Minnesota; was that in there?

A. No, that was not in the Kansas City territory as constituted in 1946.

Q. What was in the Chicago area?

A. The Chicago area as then referred to was

(Testimony of Morris B. Pendleton.)

substantially all of Illinois, Southern Wisconsin, parts of Michigan and Indiana.

Q. Now, you say that Mr. Sanger, if he took the Kansas City area, was to have the same amount of manpower. Explicitly what did that mean?

A. In 1946, under the territorial leadership of Mr. [177] Freund, there was in the Kansas City territory himself and two other men, all employees of the Plomb Company and all working for us exclusively.

Q. And what was Mr. Sanger to do if he took it over?

A. If Mr. Sanger took over the Kansas City territory as then constituted and gave up his other lines, it was my understanding from listening to the conversation that he would work there himself and with two other persons satisfactory to himself and the company.

Q. Two other persons, not three others?

A. A total of three in all.

Q. That is himself and two?

A. That is correct.

Q. And what was he to pay the other two persons?

A. The territory, as such, was at that time on a seven and one-half per cent commission, and that would be divided by negotiation between the company and the territorial representative in charge and the other two men.

Q. What was Mr. Sanger to get?

(Testimony of Morris B. Pendleton.)

A. Those splits of total territory commission are always negotiated in view of circumstances existing at the time.

Q. Was there anything clear or—well, was there any clear terms as to what that split was to be spelled out to Mr. Sanger?

A. I did not make any specific notes of the conversations [178] as conducted between Mr. Kerr and Mr. Sanger, for the reason that I was called in to listen to the discussions and they seemed to be perfectly clear and unmistakable to me at that time, and Mr. Kerr being charged with sales, I left the matter with him and Mr. Sanger.

Q. You have no idea as to what any terms as to the split were, whether they were clear and unmistakable or whether you knew about them at all?

A. I repeat what I told you before, and that is that when the persons are **finally determined as to** who work in any zone and their capabilities are known and the capabilities of the territorial leader are known, then 100 per cent of the commissions of the business from that zone at the then rates are divided between the personnel in the zone.

Q. Was it ever spelled out to Mr. Sanger as to what per cent he was to get?

A. Obviously, since he declined the offer of managing that zone as offered to him, it was wholly immaterial to determine what portion of a hundred per cent of the commissions would be paid to him or his men.

(Testimony of Morris B. Pendleton.)

Obviously, if the men that were to work with him there were the existing men who were trained and competent, then they would expect and be entitled to a larger percentage in relation to the head man's percentage. If they were green men put in, we would have another set of conditions. [179] And therefore the division of the compensation belonging to that zone between the men was immaterial, inasmuch as there was no desire expressed on Mr. Sanger's part to take that zone.

Q. Did you arrange for a conference between Mr. Sanger and Mr. Freund when he was out here?

A. No, I did not.

Q. Did you have any conversation with Mr. Sanger relative to this arrangement, other than that one conference in which you sat in with Mr. Kerr which you described?

A. The matter may have been discussed, although I never make it a policy in talking with people connected with the company or those who are seeking any connection to discuss terms and conditions of such a connection when they have already been set forth by the duly constituted official of the company who has to carry out such policies.

Mr. Kenny: That is all.

The Court: Who would determine how this 100 per cent of commissions was divided? Would the company be the final arbiter in the matter?

The Witness: As I have testified, your Honor, all the personnel in the zones are presently, and have been since '46 and in most cases, prior em-

(Testimony of Morris B. Pendleton.)

ployees of the company. Therefore, when you have a condition with what we now term zone managers, having working under him two employees of [180] the company reporting to the zone manager, therefore it is necessary for harmony within the zone that the employees working under the zone manager within the zone be compatible with the zone manager. Therefore, even though they are employees of the company, they report to the zone manager. Therefore, we are always very careful to see intra-zone employees who are competent, who will be good employees of the company but, at the same time, compatible with the zone manager so that they will work in a distant territory in harmony.

The Court: My inquiry is this: Suppose Mr. Sanger had accepted this proposition and he picked two highly compatible men and he said: "Well, now, gentlemen, I want 70 per cent, not $7\frac{1}{2}$. I will give each one of you 15 per cent." Both of them would have said no, they would not do that. Who is going to decide that dispute?

The Witness: That would be a possible situation. The company then enters the proposition. The two men that were offered 15 would say, "No; we can't make it on that small a cut." Then there would be no employees because they would not take the job.

The Court: Let us change my assumption a little bit. Suppose they just did not quit, but they were just disgruntled; they wrote in a letter to you, saying: "We think we are being very unfairly dealt with. Here, we thought we [181] would get each 25

(Testimony of Morris B. Pendleton.)

per cent, but here Sanger is offering us only 15 per cent each." What would you do about it?

The Witness: What we would do in that case would be to recognize that a disgruntled individual for an employee is no good for anybody, himself, the company, or the customers, and therefore we would recommend, if not insist, that there be a division of the gross 100 per cent of compensation within that zone so that the stipulated ability of the leader, which in this would be Sanger, we will assume, would be recognized, his experience, and still that the other two men in the zone would be given adequate compensation so that they would work happily.

The Court: Then would it be accurate to say under the proposal you made to Mr. Sanger it was for the company to decide ultimately what percentage of that $71\frac{1}{2}$ per cent from that territory he would receive?

The Witness: We have never found it necessary to arbitrarily rule on such a division. We have presently 14 zones and in all instances these matters have been happily resolved to the satisfaction of the men working under the zone managers, the zone managers, and the company.

The Court: Of course, the purpose of the provision of the contract is to furnish the ultimate authority on the subject. Would it be accurate to say that the ultimate authority in determining the amounts or proportion of this [182] seven and one-

(Testimony of Morris B. Pendleton.)

half per cent which Mr. Sanger would receive would be the company?

The Witness: In the final analysis, if there were an impasse, the company would have to determine that division.

The Court: Now, as I understood the proposals that have been testified to here with respect to handling other lines, if Mr. Sanger had accepted the Kansas City territory as then constituted, he would not be permitted to handle other lines; but if he had accepted the Chicago territory, he would have been permitted to handle other lines.

The Witness: As Mr. Kerr told us.

The Court: My question now is: What reason or basis in policy was there for the differentiation between the two territories in that privilege?

The Witness: Your Honor, as Mr. Kerr testified this morning, the magnitude of the job to be done in the Kansas City territory and the earnings therefrom had reached a point so high that it could not be satisfactorily served with other lines; and there, as Mr. Kerr indicated, a reasonable notice should be given of 30 or 60 days, I believe was his comment, in which to divest himself of his other interests so that he could have worked exclusively for the Plomb Tool Company, and at that time P & C, which was added to the line, and subsequently Penens was added to that zone.

Now, in the case of the Chicago territory, though it [183-184] was producing a volume of business in 1946 of in excess of four times the volume of busi-

(Testimony of Morris B. Pendleton.)

ness in 1941 in Sanger's then constituted territory, that figure was about four-sevenths of the business in the Kansas City territory. Then we felt that for a longer time, but not permanently, he might continue his other lines so that he might have that benefit, the benefit of them temporarily, but not to keep them permanently, because it would be inconsistent with our policy of having men divest themselves of other interests and work exclusively for the company.

The Court: Was it your judgment at that time that the Chicago territory offered Mr. Sanger was potentially as great a producer as the Kansas City territory?

The Witness: In our opinion, yes; because of the tremendous mass buying power in the thickly populated areas of the states of Illinois, Southern Wisconsin, Northern Indiana and portions of Michigan.

The Court: At the time that territory was offered Mr. Sanger how was it manned?

The Witness: That territory in Chicago at that time, in 1946, was manned by two men.

The Court: A district manager?

The Witness: And an assistant.

The Court: Did your company have any other sales representative who entered the service and applied for reinstatement [185] afterwards?

The Witness: Not that I recall.

The Court: Did you have any others who entered the service?

(Testimony of Morris B. Pendleton.)

The Witness: We had a great many employees who entered the service, I think approximately 300.

The Court: I mean comparable to Mr. Sanger.

The Witness: No, we had none.

The Court: I mean in that field.

The Witness: We had approximately 300 entered the service.

The Court: But they were not in the selling end of it?

The Witness: They were not in the selling end of the business.

Redirect Examination

By Mr. Wall:

Q. Mr. Pendleton, I believe you just said that the Kansas City territory in 1946 had developed to the point where you felt that it required the full time and attention of a district manager and at least two assistants. Do you have the figures showing the percentage of the company's total business which was produced by the Kansas City zone as constituted from time to time? In other words, can you say what percentage of the company's total gross business in 1941 and 1942 came from the Kansas City territory, and [186] the same figure for 1946?

A. I will attempt to answer your question this way, Mr. Wall, and if it is inadequate, why, rephrase it. But in 1939 the Kansas City territory as then constituted——

Q. That would be Mr. Sanger's territory at that time?

A. Yes. ——produced 5.2 per cent.

(Testimony of Morris B. Pendleton.)

Q. That is five and two-tenths per cent?

A. Per cent of the business done by our field sales force.

Q. I see, all right.

A. This is by our field sales force. In 1940 that had risen to 6.9 per cent; in 1941 it remained the same at 6.9 per cent; in 1942 under Mr. Sanger's leadership it dropped to 5.2 per cent of the field force total sales; and in 1943, when it was then under the leadership of our employee Freund, it increased to 5.9 per cent. In 1944, when manpower was further increased in the Minneapolis area, it increased to 9.7 per cent. In 1945, again with employee operating, 10.8 per cent; in 1946, 10.7 per cent; in 1947, 9.5 per cent; in 1948, 14 per cent; in 1949, 10.9 per cent as compared with an average percentage of 1939 to 1942 of about 6 per cent.

The Court: Have you comparable figures for the Chicago territory?

The Witness: The Chicago territory produced in 1939, 5.4 per cent; 1940, 4.5 per cent; 1941, 3.0 per cent, that [187] is of total sales of the total sales force. That was under manufacturers' agents. In 1942 under employee operation it increased then from an average of around 4 per cent to 4.6 per cent; 1943, 6.0 per cent; 1944, 4.8 per cent; 1945, 3.6 per cent; 1946, 4.2 per cent; 1947, 4.5 per cent. Then we curtailed the territory when it was not accepted by Mr. Sanger and the percentages are not longer comparable.

(Testimony of Morris B. Pendleton.)

Q. (By Mr. Wall): During your cross-examination, Mr. Pendleton, you stated in response to a question by Mr. Kenny that there was a good reason for the fact that the total sales in the Kansas City territory in 1949 amounted to only \$295,000 as compared with higher figures in earlier years. You were not given an opportunity to state the reason. Will you please do so?

Mr. Kenny: I reserved that opportunity to you.

Mr. Wall: Thank you.

A. The reason for the total sales of the Plomb Tool Company in 1949 dropping from—dropping in 1949 on a national basis as well as in the Kansas City territory is due to the fact that our company spent most of 1949 in recovering from the adverse effects of litigation that we had with respect to a trade-mark, when we had our field force changing the signs on some 80,000 display boards, answering innumerable questions, and the executives at headquarters were spending endless hours in negotiation and in settlement and with fear, [188] which materially ate into our time and reduced our effectiveness. And when that was finally disposed of in 1949, our incoming orders, beginning with March, 1950, have materially improved over those heretofore, and our percentage in the industry is again climbing as we have gotten over the devastating effects of that litigation.

Q. As the result of that litigation it was necessary, was it not, for you to change your trade-mark

(Testimony of Morris B. Pendleton.)

on your tools from the word "Plomb" to the word "Proto"?

A. We had to change the trade-mark on our tools and on our advertising. In other words, we discontinued the trade name "Plomb" and substituted the trade name "Proto" with all that that implies throughout the corporation.

Q. Mr. Pendleton, in your conversation with Mr. Sanger in 1946 with reference to his application for reinstatement, insofar as you know did Mr. Sanger ever question the basis of division between the personnel of the particular territory of the gross commission payable to that territory?

A. Not in my presence has it ever been raised.

Q. He did not raise that question with respect to either the Kansas City or the Chicago territories that were offered him?

A. No. At no time was that raised.

Mr. Wall: That is all.

The Court: Any further questions? [189]

Mr. Wall: May I ask one more question, your Honor?

The Court: Yes, you may.

Mr. Wall: Thank you.

Q. Mr. Kenny showed you Exhibit 17, which was a letter from Mr. Gesick as president of the Plomb Employees Association, and called your attention to a sketch at the top of the paper which shows a building and some tennis courts. You described the building. I will ask you whether there are tennis courts adjacent to that building as a part of the club house?

(Testimony of Morris B. Pendleton.)

A. No more. That is used for steel and material storage.

Mr. Wall: Thank you. That is all.

The Court: Anything further from Mr. Pendleton?

Mr. Kenny: Just a few questions, if the court please.

Recross-Examination

By Mr. Kenny:

Q. Judge Mathes asked you to furnish comparable figures as to the percentage of the business done in the Chicago territory and in the Kansas City territory. Am I correct in recapitulating your testimony to this effect, that the average of the Plomb business done nation-wide that was done in the Kansas City area when Mr. Sanger ran it, that is, between '39 and '42, was six per cent, and that the average of your business that was done in Chicago in 1946 and in '47 was about four per cent of the nation-wide business? Am I [190] correct in that?

A. Those percentages are correct of nation-wide business, but I point out the fact that dollar-wise, that 4.2 per cent in 1946 as compared to six per cent in the 1932 to 1942 area was still four times the sales volume that was done in the Kansas City area in 1941.

Q. And also, the six per cent would be four times six per cent, in other words, wouldn't it? That is, without being argumentative, the same increase would go in the Kansas City area, that is, six per

(Testimony of Morris B. Pendleton.)

cent was dollar-wise a lot more in 1946, wasn't that correct?

A. In 1946 the Kansas City territory produced in 1946 \$736,000, or seven times what it produced in dollars in 1941.

Q. In Kansas City, after '42, you know that Pratt-Whitney located a plant in Kansas City after that? A. Yes.

Q. North American Aviation located a plant in Kansas City after that? A. Yes.

Q. Remington Arms? A. Sure.

Q. Boeing Aircraft? A. Yes.

Q. Cessna? A. Yes. [191]

Q. Those all occurred during that war period; they located in and around the Kansas City territory, did they not?

A. The Kansas City territory had its share of war plants just the same as every other territory had its share.

Mr. Kenny: All right. No further questions.

The Court: You may step down, Mr. Pendleton. Your next witness.

Mr. Wall: I will call Mr. Joseph Leach.

JOSEPH G. LEACH,

called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Joseph G. Leach.

Direct Examination

By Mr. Wall:

Q. What is your business or occupation, Mr. Leach?

A. Supervisor of sales distribution for Plomb Tool Company.

Q. Are you employed by the Plomb Tool Company? A. Yes, sir.

Q. And as supervisor of sales distribution what in general are your duties?

A. My duties are to establish sales by various classification of tools, and also by classification distribution of [192] tools into particular territories and into particular zones, and in establishing commissions upon the over-all zone basis of territory.

Q. When you say establishing commissions do you mean computing commissions in accordance with rates established by other persons in the company? A. That is correct.

Q. And as a part of your activities as supervisor or sales distribution are you familiar with the territories or zones to which various men are assigned from time to time? A. I am.

Q. You are familiar also, I take it, with the identity of the men assigned to particular territory at particular times? A. Yes, sir.

(Testimony of Joseph G. Leach.)

Q. And I take it you are also familiar with the commission rates in effect from time to time?

A. Yes, sir.

Q. How long have you held this position of supervisor of sales distribution?

A. 10 years and nine months, I believe.

Q. That would be since sometime in——

A. April the 1st of 1940.

Q. April the 1st of 1940. Can you state what the commission rates were in effect in the month of January, 1946? [193]

A. In the month of January, 1946—if you don't mind, I have my notes on these various commissions—was seven and one-half per cent.

Q. Does that apply to all types of products that are sold by the company?

A. With the exception of some little bit of contract custom-made tools which went at various rates.

Q. But the seven and one-half per cent applied, did it, to all of the standard stock tools that the company produced?

A. To all standard stock tools to all representatives.

Q. That applied to all representatives?

A. To all representatives; yes, sir.

Q. Can you state when that seven and one-half per cent commission rate was established or when it went into effect?

A. It was established January the 1st, that is, it was put into effect on January the 1st, 1944.

(Testimony of Joseph G. Leach.)

Q. And had been in effect continuously up until January, 1946, is that it? A. Yes, sir.

The Court: Is it still in effect?

The Witness: No, sir. It has been changed two or three times.

Q. (By Mr. Wall): There have been changes made in commission rates since 1946, is that correct?

A. Yes, sir; there have been changes. [194]

Q. What were the commission rates in effect at the end of 1949?

A. At the end of 1949 our commission rates were eight per cent to regular jobbers.

Q. Now, you mean the salesman gets a commission of eight per cent on a sale to a regular jobber?

A. Eight per cent commission to sales to regular jobbers.

Q. Yes.

A. Seven and one-half per cent commission on sales to redistributing jobbers and six per cent commission on sales to wholesalers.

Q. I see. There were other changes between January of 1946 and this end of 1949 period that I have mentioned here, is that correct?

A. Yes, sir; there were other changes.

Mr. Wall: Your Honor, unless you or Mr. Kenny are interested in those periodic commission rate changes, I had not intended to bring them out in all particulars. I will be happy to have the information put in the record if you desire.

Mr. Kenny: Do you have it in tabular form or any way?

(Testimony of Joseph G. Leach.)

Mr. Wall: I haven't it in tabular form.

Mr. Kenny: I am not interested in it and I would be interested in any short-cutting on the presentation of it.

Mr. Wall: Very well.

Q. What is the basis of compensation—well, let me ask [195] you, first: These commissions you have testified to with respect to January, 1946, and the end of 1949, were those in effect for the Kansas City territory as constituted at those particular times?

A. They were; yes, sir.

Q. What is the present basis of compensation to salesmen operating in the Kansas City territory?

A. Well, that is a little more complicated. The present basis of the Kansas City territory is that each individual man in the territory, including the zone manager, is on a salary and expense basis plus a commission rate basis starting at one per cent, based on the first \$5,000 of sales. In other words, on the first \$5,000 he receives one per cent additional commission; on the next five he receives two per cent; on the third five he receives three per cent; on the fourth five he receives four per cent; and anything over \$25,000 or \$20,000 in sales he receives five per cent. Then in addition to that, their basis now is on consolidated sales not only of Plomb Tool Company's but its subsidiaries, P & C and Penens Corporation.

Q. Are those computed on a monthly basis, those \$5,000?

(Testimony of Joseph G. Leach.)

A. They are computed on a monthly sales basis by individual men.

Q. I see. [196]

A. And in addition, they are compensated with one per cent individually on P & C sales, sales from P & C, and also the zone manager or the head territorial man receives one-half one per cent commission on his sub-men or men who are working for him. He receives one-half one per cent override on their sales.

Q. Now, do I understand correctly, then, that the zone manager or head man receives not only the salary plus expense plus graduated commission on his own sales, but in addition to that now gets one-half one per cent commission on the sales made by other salesmen in the territory; is that correct?

A. That is correct.

Q. And with respect to P & C business, you mentioned an extra one per cent on that; is that an overriding?

A. That is an overriding commission. In other words, P & C sales and Penens sales and Plomb Company sales are consolidated for establishing these commissions.

Q. Have you finished now describing the compensation setup at the present time?

A. Well, as it exists now, we also allow an additional five per cent commission on the first shipment of new orders, of a new order.

Q. Would that be a new account?

A. Of a new account.

(Testimony of Joseph G. Leach.)

Q. When was the compensation set up that you have just [197] described as being in effect now put into effect in the Kansas City territory?

A. On January the 1st of 1950.

Q. I take it, then, that since January 1st of 1950 you have given up the former practice that has been described here of dividing the total commissions payable on the business of the territory between the men in the territory according to an agreement between them and the company?

A. In the Kansas City territory, yes, sir.

Q. Are there other territories which are presently on the same type of compensation basis as applies to Kansas City? A. There are.

Q. Can you tell me, Mr. Leach, what the basis of the division of commissions between the men in the Kansas City territory was in January of 1946? I mean, now, the territory which was then under the supervision of Mr. Freund with two other men?

A. At the end of 1946, to my recollection, it was——

Q. I am asking that as of January, 1946.

A. January of 1946—I think it went the whole year—was, the territorial manager or zone manager received 60 per cent of total earnings and his other men each received 20 per cent of the total zone earnings. As Mr. Pendleton has testified, those rates varied between zones and at times, [198] even down to men. For instance, if a man is added, naturally, the rate has to be adjusted as to the split.

(Testimony of Joseph G. Leach.)

Q. The split was on a different basis then in certain other zones, even at that time?

A. That is correct; yes, sir.

Mr. Wall: Mr. Kenny, Mr. Leach is the man who can explain the zone compensation figures which I handed you this morning and which have not yet been put in evidence, and I think it might be well to have the basis of those figures made clear to everyone.

Mr. Kenny: At this time plaintiff will offer as Plaintiff's Exhibit next in order—I believe that is 49?

The Clerk: 49.

Mr. Kenny: —three sheets consisting of a tabulation of Commissions and Reimbursed Expenses in Zone 4 for the Plomb Tool Company, P & C Hand Forged Tool Company, and Penens Corporation as a single exhibit.

The Court: During what period?

Mr. Kenny: That would be the period '46 to October, 1950.

The Court: Is there objection to the offer?

Mr. Wall: No objection, your Honor.

The Court: Received into evidence.

Q. (By Mr. Wall): Mr. Leach, I show you first Plaintiff's Exhibit 48, which constitutes three pages showing the Commission and Reimbursed Expenses for the zone manager of Zone 4, the first sheet being headed The Plomb Tool Company, the [199] second sheet being headed P & C Hand Forged Tool Co., and the third sheet being headed Penens Corpora-

(Testimony of Joseph G. Leach.)

tion. Did you prepare these schedules at my request?

A. I prepared the schedules. Yes, sir; I prepared them. I cannot testify other than from P & C records on P & C figures only for the year 1950, although they are as reported to us by P & C.

Q. Yes. Well, I understand there is no question as to the figures. We have stipulated as to those.

A. Yes, sir.

Q. Calling your attention to the first sheet of Exhibit 48, which is the Plomb Tool Company Commission and Reimbursed Expense for the zone manager of Zone 4, the first column is captioned "Year," the second column "Commission," and the third column "Expense." What represents for the year 1946 there the gross commission or the gross amount paid to the zone manager of Zone 4?

A. Well, the total of the two is the gross amount paid.

Q. You mean the total of the commission and the expense figures?

A. That is right, because he paid his own expenses and was reimbursed by the company. His actual earnings, of course, are below the commission if he actually spends what he turns in as expenses.

Q. The expenses are expenses that he pays but which [200] are charged against the gross commissions coming to him, is that correct?

A. That is correct.

Q. So that his net figure for any one of these periods would be the figure in the column headed "Commission"?

A. That is correct.

(Testimony of Joseph G. Leach.)

Q. I take it that the same applies to—well, there is no expense on the other.

A. The expense is all absorbed in the one company.

Q. Further referring to the first sheet of Exhibit 48, I note that the fourth item down the column is "To Sept. 30, 1949." I take it that covers the first nine months of 1949?

A. It is the first nine months.

Q. The next item is "Oct.-Nov.-Dec. 1949," which is the last three months of that year.

A. That is correct.

Q. And the next item being "Year 1949" is the total of the two preceding items, is that correct?

A. That is correct.

Q. In other words, in totaling the column at the bottom, the year 1949 is in there twice in two different ways?

A. That is correct.

Q. I believe you stated a few moments ago that since January 1, 1950, in this zone 4—which, incidentally, is the Kansas City territory, is it [201] not?

A. That is correct; yes, sir.

The Court: We will take the afternoon recess of five minutes.

(Short recess.)

Q. (By Mr. Wall): Mr. Leach, referring to Exhibit 48, the sheets that I was showing you before the recess, I note that the P & C and Penens sheets show no commissions for the year 1950. Do I understand your prior testimony to be that the Plomb

(Testimony of Joseph G. Leach.)

Tool Company figures for 1950 give you P & C and Penens commissions? A. They do.

Q. On this Exhibit 48 showing Commission and Reimbursed Expenses for Zone Manager Zone 4 appears, as I understand, the compensation paid to Mr. Freund for the years there set forth?

A. That is correct.

Q. Now I show you Plaintiff's Exhibit 49, which, again, is made up of three sheets, one for The Plomb Tool Company, one for P & C, and one for Penens, and which on the Plomb Tool Company sheet shows the same yearly break-down as on Exhibit 48, but shows a double column of commission and expense under the name "Freund," under the name "Folkerts," "Lohr," and several other names. Does that represent the total compensation paid by Plomb Tool Company with respect to the Kansas City territory as it existed from time to time during that period? [202] A. It does.

Q. The column at the lower right-hand corner headed "Total" shows the total commission and expenses paid in the entire territory, is that correct?

A. In the entire zone; yes, sir.

Q. The column headed "Freund" in the upper left-hand corner, I take it is identical with the information on Exhibit 48, is that correct?

A. It is.

Q. And the columns under the other names show amounts paid to other salesmen employed in that territory from time to time?

A. That is correct.

(Testimony of Joseph G. Leach.)

Q. And the P & C and Penens sheets which are a part of Exhibit 49 are prepared on substantially the same basis, are they? A. Yes, sir.

Q. And I take it it is true in this case also that the figures for the year 1950 paid by Plomb Tool Company include commissions on P & C and Penens products? A. That is correct.

Q. Mr. Leach, there has been testimony here to the effect that the Kansas City territory as constituted in January, 1946, did not include the state of Minnesota and a portion of the state of South Dakota which had been in 1942 [203] included in Mr. Sanger's territory; is that correct?

A. Yes, sir.

Q. Have there been any times in the period since January, 1946, when the Kansas City territory included the areas which were not within Mr. Sanger's pre-war territory?

A. Yes, there has. In, I believe, 1947 part of the Chicago area was included in zone 4.

Q. And there have been changes in the zone from time to time, and the figures, then, that are included here in Exhibits 48 and 49 represent the earnings from that zone as it was constituted from time to time, sometimes having less territory than Mr. Sanger's old territory had, and other times having more, is that correct? A. Yes, sir.

Q. Mr. Leach, did you have any conversation with Mr. Sanger in Los Angeles during January of 1946? A. Yes, sir.

Q. Did you have any conversation in which his

(Testimony of Joseph G. Leach.)

application for reinstatement with the company was discussed or mentioned?

A. Yes, sir; just in a matter of fact way.

Q. I beg pardon? A. Yes, sir; I did.

Q. Will you state what, if anything, Mr. Sanger said to you in that regard?

A. Well, on his various trips in and out of the office [204] he would stop at my office and we would get into conversation. And he said—I remember clearly that when he first came in he said he was in to get his old territory back. And perhaps two or three meetings later, that I have had occasion to converse with him at my desk in my office, why, he told me that he was offered his territory back if he would give up his other lines.

Q. Did he state whether or not he intended to accept it on that basis?

A. He said he was not——

Mr. Kenny: I think that these leading questions in a conversation of this kind are objectionable.

Mr. Wall: I beg your pardon, Mr. Kenny. I think the objection is well taken. I will withdraw the question.

Q. Was there anything further said between you in connection with that subject?

A. Well, not other than that he just said that he was not going to accept it because he couldn't have his other lines.

Mr. Wall: No further questions.

Mr. Kenny: No questions.

The Court: You may step down, Mr. Leach. Your next witness.

Mr. Wall: I will call Mr. Baumgardner for just a couple of questions. [205]

HENRY C. BAUMGARDNER,
called as a witness by the defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name?

The Witness: Henry C. Baumgardner.

Direct Examination

By Mr. Wall:

Q. Mr. Baumgardner, you are an officer of the Plomb Tool Company, are you?

A. Yes, I am.

Q. What is your office?

A. I presently am vice-president, treasurer, and comptroller.

Q. How long have you been connected with the Plomb Tool Company?

A. Since August, 1945.

Q. In your capacity as treasurer and comptroller are the records of the company with respect to the financial transactions under your custody and control?

A. Yes, they are.

Q. Have you had a check made of the company's records in order to determine whether or not payments or deductions for social security were taken from the compensation paid to sales representatives prior to January 1st, 1942?

(Testimony of Henry C. Baumgardner.)

A. Yes. I personally examined the duplicate copy of [206] the quarterly social security report for the years 1938, '39, '40, '41, and '42, and no deductions were taken until 1942.

Q. Were deductions taken in 1942 with respect to compensation paid to Mr. Sanger?

A. No, no deductions were taken.

Q. Were deductions taken in 1942 with respect to the sales representatives who were then on a full-time employee basis?

A. Yes, such deductions were taken.

Mr. Wall: That is all.

The Court: You may step down, Mr. Baumgardner.

Mr. Wall: Defendant rests, your Honor.

Mr. Kenny: Call Mr. Sanger.

The Court: This is for rebuttal?

Mr. Kenny: That is correct.

LIONEL H. SANGER,

the plaintiff herein, recalled as a witness in his own behalf in rebuttal, being previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Kenny:

Q. Calling your attention to the conversations held between you and Mr. Kerr and Mr. Pendleton in January of 1946 here in Los Angeles, will you state what was said between [207] you relative to

(Testimony of Lionel H. Sanger.)

the Chicago territory and relative to the Kansas City territory?

A. It was a general conversation where Mr. Pendleton just dropped in a few minutes. Most of the conversation was with Mr. Kerr. And they mentioned Chicago territory in addition to the Kansas City territory.

Q. Now, can you state as explicitly as possible everything that was mentioned about the Chicago territory, first, and what either one of these gentlemen said and what you said in response to that.

A. In regard to the Chicago territory they said that the sales volume was very unsatisfactory.

The Court: Who said it?

The Witness: Mr. Kerr.

The Court: He isn't "they," is he?

The Witness: No, sir.

The Court: You tell us. We were not there.

"I will tell you what I will do, like this." Now, you tell us.

The Witness: Yes, sir. Mr. Kerr mentioned that the Chicago territory volume was very unsatisfactory and that he had been thinking of putting the two territories together, and that possibly something could be worked out whereby I could take both territories and have Mr. Freund and the assistants work for me in that territory. And, as I [208] remember the conversation as to figures, he mentioned that I would get approximately 40 per cent, and I think the 40 per cent came mostly from the Kansas City—you see, the monies accumulated—as Chicago

(Testimony of Lionel H. Sanger.)

was not doing much at that time, and there was going to be a definite change there. And he said that he was going to send for Mr. Freund and that when he arrived in California, he would hold a conference with him and then I get in touch with him. And I don't recall any further conversations. I did not get to see Mr. Pendleton again after that first meeting.

The Court: Did he ask you to make him some offer?

The Witness: Yes, sir. When I left, he says—after I called for about two and a half to three weeks I did not visit the plant again. He said, “The best thing you can do, don't stay over on our part.” He said, “You go back to Kansas City, give us some propositions, we will be thinking in the meantime out here, and you will hear from us and we will hear from you.”

The Court: That is Mr. Kerr?

The Witness: That is Mr. Kerr. I didn't see Mr. Pendleton after that. Mr. Pendleton was reported as having gone east by his secretary and I stopped calling him except the last day before I left, I called Mr. Pendleton once more and he was still in the east.

Q. (By Mr. Kenny): Did either Mr. Kerr or Mr. Pendleton [209] state to you that you could have the Chicago territory and your old lines?

A. Not to my recollection, no, sir; because it is so ridiculous working only one part of the United States for Plomb Tool Company. I don't think Mr.

(Testimony of Lionel H. Sanger.)

Kerr realized or realizes that it could not be done, and it was not offered.

Q. That is, it would be ridiculous to be selling the other lines in the Kansas City territory and the Plomb tools in the Chicago territory?

A. I could only be giving—if I divided my interests, I could only give half to the Plomb Tool Company and half to the other line, at best.

Q. Did you have a discussion to that effect with Mr. Kerr or was there no discussion about it?

A. There was no discussion, to my recollection.

Q. Did either Mr. Kerr or Mr. Pendleton say that you could have the Kansas City territory without Minnesota and South Dakota, but keeping additional men on the job?

A. The only way they mentioned that was that they would send for Mr. Freund, and then they would contact me, and I heard nothing after that, except the time when Mr. Kerr came through, and then it was a friendly visit at the Muelbach Cafe—Muelbach Hotel in Kansas City, and he mentioned that it was not up to him; that Mr. Pendleton was relying on this eastern research and he was 100 per cent sold on a direct man, [210] and that was it. And after that I went to Selective Service.

Q. Did Mr. Kerr tell you that you would get 40 per cent and the other two men would get 30 per cent apiece in the Kansas City territory?

A. He did go over what the deal was if anything went further of selecting, you know, after the Freund conversation. He said, "We don't pay direct

(Testimony of Lionel H. Sanger.)

like we did, that is, the one man. It is a split basis and the manager of the zone gets 40 per cent and 60 per cent is divided among the other two men."

Q. Did you discuss your rights under Selective Service either with Mr. Kerr or Mr. Pendleton?

A. I don't recall if it was mentioned specifically other than when I left. I told them that I didn't want to take the steps of going to Selective Service, and I was informed by Mr. Kerr that I did not have any rights under Selective Service, but they did want me with them because they respected my sales ability.

The Court: In January?

The Witness: Yes, sir.

Q. (By Mr. Kenny): When was the first time you were told that? Was that in January?

A. The first time was in, I think, the first meeting in December, is the way I recall it, but it was within a week period there.

Q. When you saw Mr. Kerr in Chicago did you discuss [211] with him your previous correspondence with him while you were in the service about your post-war plans?

A. When I saw him—I don't recall when you mean I saw Mr. Kerr.

Q. Mr. Kerr testified that you and he met at the Auto Parts show in Chicago.

A. We didn't go into any details there that I recall. He just said, "Well, as long as you are coming out to the Coast, I will see you when you get out there." That is the way I recall.

(Testimony of Lionel H. Sanger.)

Q. You recall I asked Mr. Kerr about the practice of selling tools along with other automotive parts lines. Can you tell us whether or not that practice requires additional men or manpower, that is, whether other lines are carried in addition to a tool line in the automotive field?

A. Well, the reason I feel it applies more or less to a territory in that regard is the distance between towns in the territory. I had carried the Plomb Tool Company line along with the parts lines since 1931, and I believe I showed an increase practically every year on the Plomb Tool Company. When I started there they had no customers, and in most cases after calling on one customer in the morning, at the best, and another one in the afternoon, when you once get away from the larger cities like St. Louis, Kansas City, Omaha, time doesn't mean much because there is too much [212] distance involved to make the next town. So therefore that time is used and there is actually no further effort required than to sell more than one line.

Q. In other words, as you go into a small town you have got to devote that whole day to that town, anyway; you have gone that far and that time is spent in offering all the lines that you have?

A. Yes, sir.

Mr. Kenny: You may cross-examine.

Mr. Wall: No questions, your Honor.

The Court: You may step down, Mr. Sanger.
Any further rebuttal?

Mr. Kenny: No, no further.

The Court: Does plaintiff rest?

Mr. Kenny: We rest.

Mr. Wall: Defendant rests.

The Court: Will you be ready to argue the matter tomorrow morning at 10:00 o'clock, gentlemen?

Mr. Wall: Yes, your Honor.

The Court: Very well, we will hear the oral argument tomorrow morning at 10:00 o'clock. The trial will be recessed until that time. Court will adjourn.

(Whereupon an adjournment was taken until 10:00 o'clock a.m. of the following day, Thursday, December 21, 1950.) [213]

Friday, January 5, 1951, 2:00 P.M.

The Court: You may proceed, Mr. Wall.

Mr. Wall: Thank you, your Honor. At the outset, may I express my appreciation to the court and counsel for their courtesy and consideration for me at our last session?

Mr. Somers has called to my attention, your Honor, that neither party offered into evidence the pre-trial stipulation which is on file in this matter. I do not know what your Honor's practice is in that regard, but I should like to offer the pre-trial stipulation in evidence by reference to the filed document, if I may do so.

The Court: Yes. It is in the record, but I think the better practice is to offer it into evidence and give it an exhibit number, and then on appeal it won't be overlooked.

Mr. Wall: I think that is the better practice, too, your Honor.

The Court: Is there objection?

Mr. Kenny: No objection.

The Court: Very well, the evidence is opened and the Pre-Trial Stipulation filed—do you have the filing date on that?

Mr. Wall: I think so.

The Court: Filed September 20, 1950——

Mr. Wall: That is correct, your Honor.

The Court: ——is received into evidence as Plaintiff's Exhibit. Do you have the next exhibit number, Mr. Clerk?

The Clerk: I haven't my notes here, your [214] Honor.

Mr. Wall: I think it will be 50, your Honor.

The Court: It will be Exhibit 50 according to my notes. [215]

* * *

Wednesday, January 9, 1951—1:30 P.M.

Excerpt

The Court: This case would not be any clearer to me on the principal question in it if we discussed it indefinitely. It has been most helpful to have your argument, but it is a close question whether this plaintiff is so far an independent contractor as to be without the protection of the statute. It is a doubtful question, but I will resolve the doubt in his favor and hold that at the time he left the service he held a position in the employ of the defendant

within the meaning of the Selective Service Act of 1940 as amended. That is a phrase of indefinite content, but I am of the opinion that it is broad enough to cover this plaintiff, and so hold.

As far as the defense of laches is concerned, the company itself contributed to the delay, and I find that inaction on the part of the plaintiff and delay on his part did not result in any change in the real situation of the company to its prejudice. The plaintiff is entitled to be restored to a position of like seniority, status and pay equivalent to that left by him.

The offer made to him upon his return, for the reasons heretofore mentioned, in my view, was not an offer of reinstatement. I do not think the company intended it to be such, but even though, as has already been said, the company [216] might not have intended it, the test is whether it was. In my view it falls short of being an offer of reinstatement to a position of like seniority, status and pay, (1) by reason of the indefiniteness of the commission rate, and (2) by reason of the fact that although one other salesman who had not entered the service was being permitted to handle other lines in another territory, that privilege which this plaintiff had enjoyed prior to the time he entered the service was to be denied him in the offer made.

I find that the plaintiff is entitled to be restored to the position in charge of the Kansas City territory—the territory as constituted at the time he entered the service—at a commission rate the same as when he entered the service, for a period of one

year following his return from the service and his application for reinstatement, which would be early in January of 1946 and, for all practical intents and purposes, would be for the period of one year, 1946.

The defendant having wrongfully refused to reinstate the plaintiff, the plaintiff is entitled to damages from the defendant for loss of earnings during the year of 1946, plus interest thereon as provided by law, and less any tax or other deductions required by law.

I do not attempt here to find the amount. I will leave that to you gentlemen to attempt to reach it. If you cannot arrive at it, I will hear both of you and determine it. [217]

But as far as the damages for the defendant's unlawful refusal of re-employment during the year 1946, I find that what had been promised by the law to the plaintiff was a commission on all sales of the Plomb Tool Company in the Kansas City territory as constituted prior to the entry of the plaintiff into the service, at the commission rate then paid him, plus what he would have earned and did earn by the handling of other lines as was his practice at the time he entered the service, less his expenses which he customarily paid prior to entering the service; and I will make a finding as to what those were if you gentlemen cannot arrive at that. This is for the year 1946.

It will be ordered that the defendant Plomb Tool Company be enjoined and ordered forthwith to reinstate the plaintiff as head of the Kansas City territory as presently constituted, and at such rates

of compensation, under such financial arrangement as now exists for the head of that territory.

The defendant and its officers, agents, and those acting for it are enjoined not to discharge the plaintiff from such position without cause for a period of one year from the date of such restoration. If the provisions for restoration are not complied with within 10 days after written notice of entry of judgment, the petitioner will be given the opportunity to apply to the court for further relief, and the court will reserve jurisdiction to make any further orders that may be [218] necessary in the case.

Counsel for the plaintiff will prepare findings of fact, conclusions of law, and judgment and submit them under Local Rule 7 within five days. Perhaps you had better have 10 days, I suppose.

Mr. Kenney: Yes. I am going to ask the reporter to write up everything after I stopped talking. Do you want a copy?

Mr. Wall: Yes, I would like a copy.

Mr. Kenny: Then we can draw that. 10 days would probably be easier.

The Court: I will adopt the plaintiff's view as to the damages as far as the period is concerned. It will be limited to the year 1946, which I find to be the period of one year during which the defendant would have been required by law to retain the plaintiff in its employ at like pay, within the meaning of the statute, had the plaintiff's rights under the Selective Service Act, as I find them to exist, been observed. However, as I stated during argument, if you gentlemen cannot agree upon those damages but

you can agree upon the so-called damage for delay period, I would award damages from the date of filing of the complaint down to date.

I believe that covers everything.

Mr. Kenny: Yes, sir. [219]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of January, A.D. 1951.

/s/ ALBERT H. BARGION,
Official Reporter.

[Endorsed]: Filed January 22, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 31, inclusive, contain the original Complaint; Answer to Complaint; Findings of Fact and Conclusions of Law; Judgment for Plaintiff; Notice of Appeal; Statement of Points on Which Appellant Intends to Rely on Appeal, and Designation of Record on Appeal, which, together with copy of reporter's transcript of proceedings on December 19 and 20, 1950, and January 5 and 9, 1951, in three volumes, and original plaintiff's exhibits 1 to 51, inclusive, and original defendant's exhibits A to U, inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28th day of February, A.D. 1951.

[Seal]

EDMUND L. SMITH,

Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12873. United States Court of Appeals for the Ninth Circuit. The Plomb Tool Company, a Corporation, Appellant, vs. Lionel H. Sanger, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 2, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12873

THE PLOMB TOOL COMPANY, a Corporation,
Appellant,

vs.

LIONEL H. SANGER,

Appellee.

STATEMENT OF POINTS

Appellant above named hereby states the following points on which it intends to rely on this appeal from the judgment rendered by the United States District Court herein:

1. Appellee's claims for reinstatement and damages under the Selective Training and Service Act of 1940, as amended, are barred by the Statute of Limitations, to wit, Section 338, Subdivision 1 of the Code of Civil Procedure of the State of California; and the District Court erred as a matter of law in concluding to the contrary.

2. Appellee's claims for reinstatement and damages are barred by laches and delay on his part; and the District Court's finding that plaintiff was not guilty of laches is not supported by any substantial evidence and is contrary to the evidence.

3. Appellee's pre-war status was that of an independent contractor, and hence he is not entitled to reinstatement or damages under the Selective

Service and Training Act of 1940, as amended; and the District Court's conclusion that appellee left a position in the employ of appellant within the meaning of said Act and that his pre-war status was not that of an independent contractor is contrary to law, and its finding to the same effect is not supported by any substantial evidence and is contrary to the evidence.

4. Appellee is not entitled to the relief granted by the District Court, even assuming, without conceding, that he left a position in the employ of appellant within the meaning of the Selective Service and Training Act, and that his claim is not wholly barred by the Statute of Limitations or by laches, in that:

(a) Appellant's circumstances had so changed by the time of appellee's application for reinstatement as to make it unreasonable, within the meaning of said Act, to require appellant to restore appellee to his pre-war status; and the District Court's conclusion to the contrary is contrary to law and is not supported by the findings of fact or by any substantial evidence.

(b) The appellant fully satisfied any obligation it may have had to appellee by offering him "a position of like seniority, status and pay" within the meaning of said Act, and his rejection of such offer bars his claims to reinstatement and damages; and the District Court's conclusion to the contrary is contrary to law and is not supported by the findings of fact or by any substantial evidence.

5. Assuming, without conceding, that appellee is entitled to any relief, the relief awarded appellee by the District Court is excessive as a matter of law in that:

(a) By reason of his delay in filing this action, appellee is not entitled to recover any damages for loss of earnings for any period prior to the commencement of this action on September 22, 1949; and the District Court erred in awarding him damages measured by his loss of earnings during the calendar year 1946.

(b) The Selective Service and Training Act guarantees a veteran only one year's re-employment and it was therefore error for the District Court to award appellee damages measured by his loss of earnings during the entire calendar year 1946 in addition to ordering appellant to reinstate appellee and enjoining appellant not to discharge him without cause for the period of one year.

(c) If appellee was entitled to any damages measured by loss of earnings for the year 1946,

(i) Such loss of earnings should have been computed on the basis of the commission rate of $7\frac{1}{2}\%$ actually in effect for all appellant's sales representatives during that year; and the District Court erred as a matter of law in computing such loss of earnings on the basis of appellee's pre-war commission rates of $12\frac{1}{2}\%$ and $8\frac{1}{2}\%$; and

(ii) Such loss of earnings should have been computed on the basis of appellant's Kansas City territory as the same was constituted in 1946; and the District Court erred as a matter

of law in computing such loss of earnings on the basis of appellee's larger pre-war territory.

(d) Any damages awarded appellee for loss of earnings are subject to offset for amounts earned by appellee in other employment during the same period; and the District Court erred as a matter of law in refusing to allow such offset for appellee's earnings from personal services rendered to others during the year 1946.

O'MELVENY & MYERS,

SIDNEY H. WALL,

By /s/ SIDNEY H. WALL,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 12, 1951.

[Title of Court of Appeals and Cause.]

STIPULATION AND APPLICATION FOR CONSIDERATION OF ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between appellant and appellee above named, through their respective attorneys of record, that subject to the approval of this Honorable Court the following original exhibits in the above-entitled cause which have been transmitted to this Court by the Clerk of the United States District Court for the Southern District of California, Central Division, may be considered by

this Honorable Court in their original form without printing:

1. Plaintiff's Exhibit 13, consisting of a Plomb Tool Company inter-office memo dated April 8, 1940, from Dillon Stevens to Lionel Sanger on the subject of "service button" to which is attached a copy of a program for a Plomb Tool Company Family Day Party (which program would be difficult to reproduce accurately by printing).

2. Plaintiff's Exhibit 26, consisting of a copy of page 3 of the "The Anvil Chorus" dated January 1, 1943 (being a page from a printed paper which would be difficult to reproduce accurately by printing).

3. Plaintiff's Exhibit 32, consisting of a business card of appellee.

4. Defendant's Exhibits A, E and H, consisting, respectively, of letters written by appellee upon letterheads of Kansas City Warehouse Service Co., Kansas City Warehouse Service Company and Lionel H. Sanger, the form of which letterheads the appellant desires to call to the Court's attention in their original form.

5. Defendant's Exhibits J, K, L, M, N and O, consisting, respectively, of photostatic copies of appellee's federal income tax returns for the calendar years 1941, 1942, 1946, 1947, 1948 and 1949, all of which returns would be difficult to reproduce accurately by printing.

6. Defendant's Exhibit Q, consisting of a colum-

nar schedule entitled "Sanger's Earnings," which schedule would be difficult to reproduce on one page.

7. Defendant's Exhibit S, consisting of a columnar schedule which likewise would be difficult to reproduce on one printed page.

Appellant and appellee, through their respective attorneys of record, respectfully make application to this Honorable Court for an order that the original exhibits enumerated above (Plaintiff's Exhibits 13, 26 and 32, and Defendant's Exhibits A, E, H, J, K, L, M, N, N, O, Q, and S) be considered by this Honorable Court on this appeal in their original form without printing.

Respectfully submitted,

O'MELVENY & MYERS,

SIDNEY H. WALL,

By /s/ SIDNEY H. WALL,

Attorneys for Appellant.

KENNY & MORRIS,

By /s/ ROBERT S. MORRIS,

Attorneys for Appellee.

/s/ WILLIAM DENMAN,

/s/ WM. ORR,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed March 12, 1951.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

To: The Honorable Paul P. O'Brien, Clerk of the
Above-Entitled Court:

Appellant above named hereby designates the following portions of the record certified to the above-entitled Court by the Clerk of the District Court, which appellant considers material to the consideration of this appeal:

1. The entire clerk's transcript certified by the Clerk of the District Court, comprising pages 1 to 31, inclusive.

2. The entire reporter's transcript of the proceedings in the District Court on December 19 and 20, 1950, comprising pages 1 to 213, inclusive.

3. That portion only of the reporter's transcript of the proceedings in the District Court on January 5, 1951, commencing with line 1, page 2, and ending on line 2, page 3 (omitting therefrom all that portion thereof commencing with line 3, page 3, and ending on line 17, page 56).

4. The entire reporter's transcript of the oral opinion of the District Court rendered on January 9, 1951, comprising pages 1 to 5, inclusive.

5. All plaintiff's exhibits 1 to 51, inclusive, excepting only that portion of plaintiff's Exhibit 50 (the Pre-Trial Stipulation) comprising pages 11 to 17, inclusive, of said Exhibit 50.

6. All defendant's Exhibits A to U, inclusive.
7. This Designation of Record on Appeal.
8. The Statement of Points filed herewith.

With reference to designations 5 and 6 above, you are advised that appellant and appellee intend to apply to the above-entitled Court for an order directing that certain of the exhibits transmitted by the Clerk of the District Court (to wit: plaintiff's Exhibits 13, 26 and 32, and defendant's Exhibits A, E, H, J, K, L, M, N, O, Q and S) be considered by the above-entitled Court in their original form without printing.

O'MELVENY & MYERS,

SIDNEY H. WALL,

By /s/ SIDNEY H. WALL,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 12, 1951.